D.P.U. 94-176

Petition of Stow Municipal Electric Department for a determination by the Department of Public Utilities of damages pursuant to St. 1898, c. 143, and G.L. c. 164, §§ 42 and 43.

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I. INTRODUCTION

A. Procedural History

On November 22, 1994, Stow Municipal Electric Department ("SMED") petitioned the Department of Public Utilities ("Department") for a determination of purchase price and damages, if any, pursuant to G.L. c. 164, §§ 42 and 43 ("Section 42" and "Section 43," respectively)[1] resulting from SMED's severance from the Hudson Municipal Light & Power Department ("HL&PD") system. The petition was docketed as D.P.U. 94-176.

On December 12, 1994, HL&PD filed its answer to SMED's petition. Massachusetts Municipal Wholesale Electric Company ("MMWEC") was allowed to intervene as a party on the limited issue of what impact this dispute would have on MMWEC and whether and how the Department should consider such impact, if any, as a public interest factor pursuant to Section 43. Massachusetts Electric Company ("MECo") was granted limited participant status for the purpose of filing briefs.

The Department held a public hearing in Sudbury, Massachusetts, on February 7, 1995. On April 6, 1995, SMED, HL&PD, MMWEC and MECo filed pre-hearing briefs.

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[1] Section 42 provides that, once a town has voted to establish a municipal light plant by passing two town meeting votes, the town may purchase from the entity which had previously served the town, at such price and on such terms as may be agreed upon, the portion of the plant and property within its limits. Section 43 provides that, if parties cannot agree as to the price or the property to be included in the purchase within 150 days of the passage of the final town meeting vote, either party may apply to the Department for a determination of what property ought, in the public interest, to be included in the purchase and what price would reflect the fair value of such property. Section 43 further provides that such price shall include damages, if any, that the Department finds would be caused by the severance of the property proposed to be included in the purchase from the property of the owner.

The Department also conducted public and evidentiary hearings at its offices on June 12, 13, 14, 15, and 19, 1995. At the hearings, SMED presented the testimony of two witnesses: Lee Smith, chief economist with LaCapra Associates; and Edmund Felloni, president of Consulting Engineers Group, Inc. and superintendent of engineering and operations for the Town of Wellesley Municipal Light Plant. HL&PD presented the testimony of two witnesses: Robert G. Taylor, a senior consultant with R.W. Beck; and John J. Reed, president of Reed Consulting Group. MMWEC sponsored the testimony of James Fuller, assistant treasurer and treasury department manager of MMWEC. The record contains 208 exhibits and 32 record requests. SMED, HL&PD, MMWEC and MECo filed initial post-hearing briefs on August 31, 1995, and reply briefs on September 14, 1995.

B. Background

On June 30, 1993, the Town of Stow ("Stow"), in connection with Stow's intent to sever from the HL&PD system, petitioned the Department for an advisory ruling that severance damages, as used in Section 43, specifically exclude consequential and economic damages relating to wholesale power purchase contracts and other contractual relationships relating to the ownership or purchase of electric generation. The petition was docketed as D.P.U. 93-124. HL&PD moved to dismiss Stow's petition.[2] On May 5, 1994, the

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[2] On September 7, 1993, HL&PD filed a motion for a stay of the briefing schedule and a motion for a hearing on HL&PD's motion to dismiss. The Hearing Officer denied HL&PD's motion for a stay on September 28, 1993. Hearing Officer's Ruling On Motion to Stay Briefing Period, D.P.U. 93-124, at 4 (September 29, 1993). HL&PD appealed the Hearing Officer's Ruling to the Commission. On November 29, 1993, the Department issued an Order denying HL&PD's appeal of the Hearing Officer's ruling. Town of Stow, D.P.U. 93-124 (1993).

Department issued an Order, denying HL&PD's motion to dismiss and stating that the Department was not prepared to make a conclusive determination in an advisory ruling that severance damages, as a matter of law, either do or do not include liabilities such as consequential and economic damages relating to contractual relationships. Town of Stow, D.P.U. 93-124-A (1994). The Department determined that this issue must be litigated fully before the Department could enunciate a final position on severance damages. Id. at 12.

On May 11, 1994, Stow filed a Motion for Reconsideration of the Department's advisory ruling in Town of Stow, D.P.U. 93-124-A (1994). In Town of Stow, D.P.U. 93-124-B (1994), the Department clarified its previous ruling by stating that the Department regarded first-time impression constructions of a statute as best made during adjudication of an actual controversy.

On May 4, 1993 and on June 1, 1994, pursuant to St. 1898, c. 164, §§ 12-14 and Sections 42 and 43, Stow passed town meeting votes to establish a municipal electric department, which it named Stow Municipal Electric Department. The votes were certified to the Department pursuant to G.L. c. 164, § 37. SMED and HL&PD negotiated for the statutorily mandated 150 days, but were unable to agree as to what property should be included in a sale between SMED and HL&PD, or at what price. See G.L. c. 164, § 43. SMED then petitioned the Department for such a determination.

II. DETERMINATION OF PROPERTY IN PURCHASE

A. Introduction

A number of statutes address the issue of what property should be included in this purchase. First, Statute 1898, c. 143 ("Enabling Act"), the special act that authorizes HL&PD to serve Stow, provides that if Stow were to vote to establish its own municipal plant, Stow shall purchase "the plant and property of the town of Hudson established within the limits of the town of Stow...." The Enabling Act further provides that such purchase shall be in accordance with the provisions of the Municipal Ownership Law, St. 1891, c. 370, §§ 12, 13, and 14, and of any general laws thereafter enacted relating to the purchase of electric light plants by a municipality.

Statute 1891, c. 370, § 12 provides that if the central lighting station "lie within the limits of the city or town which has voted to establish a plant ... such city or town shall purchase as herein provided the whole of such plant and property used in connection therewith, lying within its limits...." This statute further provides that, if the central lighting station does not "lie within the city or town which has voted as aforesaid, then such city or town shall only purchase that portion of plant and property which lies within its limits ...." St. 1891, c. 370, § 12. Sections 13 and 14 of St. 1891, c. 370 set forth the procedures to enforce the obligation to purchase under Section 12 by appointing a special commissioner to determine what shall be purchased and to appeal that determination to a

court, respectively. St. 1891, c. 370 has been amended a number of times.[3] The current version of St. 1891, c. 370, §§ 12-14 is codified at G.L. c. 164, §§ 42-43.

Section 42 provides that, once a town has voted to establish a municipal lighting plant by passing two town meeting votes, the town may purchase from the entity which had previously served the town, at such price and on such terms as may be agreed upon, the portion of the plant and property within its limits. Section 43 provides that, if parties cannot agree as to the price or the property to be included in the purchase, either party may apply to the Department for "a determination as to what property ought in the public interest to be included in the purchase and what price should be paid ...."

With reference to the property to be included in the purchase, the parties have raised a number of issues including: (1) what legislation controls; (2) how broadly the term "property" should be defined; and (3) what public interest factors should be considered in determining what property ought to be included in the purchase. These issues are addressed below.

B. Controlling Legislation

1. Positions of the Parties

a. SMED

SMED argues that the Enabling Act, a special act, incorporates by reference (by means of its reference to §§ 12-14 of c. 370, St. 1891) the provisions of Sections 42 and 43,

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[3] See St. 1893, c. 454, §§ 4 and 5; St. 1894, c. 538; R.L. 1902, c. 34, §§ 10 and 11; St. 1903, c. 255; St. 1905, c. 410, § 1; St. 1914, c. 742, §§ 100, 101, and 199; G.L. c. 164, § 42; St. 1929, c. 379, § 2.

a general act, which are consonant and not inconsistent with the Enabling Act (SMED Pre-Hearing Brief at 15). SMED argues that under this statutory interpretation, the property to be purchased is limited to the physical plant and property established by HL&PD within Stow's town limits (id.).[4] Under this interpretation, no other property, whether it was tangible or intangible, than that located in Stow, could be included in the purchase.

SMED further states that the provisions of St. 1898, c. 143, § 2, control in this matter, arguing that the more specific language of a special statute (St. 1898, c. 143, § 2) controls and limits the more general language of a general statute (G.L. c. 164, § 43) (SMED Reply Brief citing Plymouth County Retirement Association v. Commissioner of Public Employee Retirement, 410 Mass. 307, 312 (1991); Risk Management Foundation of Harvard Medical Institutions v. Commissioner of Insurance, 407 Mass. 498, 505 (1990); Hennessey v. Berger, 403 Mass. 648, 651 (1988); Pereira v. New England LNG Company, 364 Mass. 109, 118 (1973); Spring v. Geriatric Authority of Holyoke, 394 Mass. 274,

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[4] SMED cites the Enabling Act, which provides in pertinent part that:

> The town of Stow shall, if it establishes a gas or electric light plant of its own under the provisions of chapter three hundred and seventy of the acts of the year eighteen hundred and ninety-one, be held to purchase, and shall purchase, the plant and property of the town of Hudson established within the limits of the town of Stow, in accordance with the provisions of section twelve, thirteen and fourteen of said chapter three hundred and seventy and any amendments thereof ... provided, further, that in such case the town of Hudson ... shall ... file with the clerk of the latter town [Stow] a schedule of said property and plant located within the limits of the town of Stow, and thereafter the town of Hudson shall sell, and the town of Stow shall buy the same in accordance with provisions of sections twelve, thirteen and fourteen of said chapter three hundred and seventy and any amendments thereof ... [emphasis supplied].

(SMED Pre-Hearing Brief at 15, citing St. 1898, c. 143, § 2).

281-282 (1985); W.D. Cowls v. Board of Assessors of Shutesbury, 34 Mass. App. Ct. 944, 946 (1993)).

b. HL&PD

HL&PD argues that the current version of Section 43 governs the terms of the purchase and that this version allows a broader definition of the term property than its predecessor statute (HL&PD Initial Post-Hearing Brief at 6-8). In support, HL&PD contends that St. 1898, c. 143, § 2, provides that the purchase of the property is to be made "in accordance with the provisions of sections 12, 13 and 14 of said chapter 370 [of St. 1891] and any amendments thereof, and of any general laws hereafter enacted relating to the purchase of electric light plants by a municipality..." (emphasis added) (id. at 7). Contrary to SMED's interpretation that the incorporating language refers only to relevant sections of St. 1891 as they existed in 1891 or when the 1898 special act was enacted, HL&PD maintains that the reference to any subsequent amendments and applicable general laws necessarily means that the terms of a purchase might change from time to time (id.).[5] According to HL&PD, by including "amendments" and "any general laws hereinafter enacted," the Legislature intended that the terms of the purchase under the 1898 Hudson-Stow special act depend on the version of §§ 12-14 of c. 370, St. 1891 and the general laws in effect at the time of the purchase (id.). HL&PD notes that the current version of St. 1891, c. 370, §§ 12-14 is codified at G.L. c. 164, §§ 42-43 (id. at 8).

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[5] The current version of St. 1891, c. 370, §§ 12-14 is codified at G.L. c. 164, §§ 42-43.

c. MMWEC

MMWEC argues that the determination of the terms of any purchase from HL&PD by SMED must be made with reference to Section 43 (MMWEC Initial Post-Hearing Brief at 8). According to MMWEC, Section 2 of the special statute, St. 1898, c. 143, provides that the purchase between HL&PD and Stow "shall be effected in accordance with the provisions of c. 370, §§ 12, 13 and 14 (as then in effect) `and any amendments thereof, and of any general laws hereafter enacted relating to the purchase of electric light plants by a municipality'" (id. at 8). MMWEC asserts that under well-established rules of statutory construction, this language cannot be overlooked (id., citing School Committee of Brockton v. Teachers Retirement Board, 393 Mass. 256, 262 (1984)). In MMWEC's view, the language must be given effect, and held to mean what the words plainly signify, i.e., that upon Stow's decision to withdraw from the HL&PD system, the terms of the purchase required by the statute are to be determined with reference to, and in accordance with the general laws then in effect (id. at 8-9). MMWEC contends that Sections 42 and 43 of Chapter 164 are the applicable general laws (id. at 9). MMWEC also contends that SMED's construction of St. 1898, c. 143, § 2, which ignores the reference to "any general laws hereafter enacted relating to the purchase of electric light plants by a municipality," renders the language superfluous, in contravention of the rules of statutory construction (MMWEC Reply Brief at 4-5).

d. MECo

In its brief, MECo notes that SMED relied on the special act, St. 1898, c. 143, as an independent limit on Section 43 (MECo Initial Post-Hearing Brief at 6 n.3). MECo states

that its analysis takes into account only Section 43, but argues that the special act can and should also be construed broadly to provide the Department with sufficient discretion to meet the public interest and prevent an inappropriate cross subsidy in any sale (id.). MECo suggests that the reference in the special act to "any general laws hereafter enacted" allows the special act to be read to incorporate the public interest standard in Section 43, together with the language in Section 43, which provides the Department with broad discretion to set a fair value, including reasonable severance damages "necessary to prevent unfair cross subsidies and assure the consistent implementation of important state policies for the efficient and effective restructuring of the electric industry" (id.).

2. Analysis and Findings

All parties agree that the Enabling Act authorizes HL&PD to provide electricity to the inhabitants of Stow. St. 1898, c. 143, § 1. The Enabling Act, by its reference to St. 1891, c. 370, §§ 12-14, also establishes the terms and procedures for a purchase by Stow of HL&PD's plant and property located in Stow should Stow determine to establish its own municipal electric system. St. 1898, c. 143, § 2. The issue raised by the parties is whether the Enabling Act's reference to St. 1891, c. 370, §§ 12-14 incorporates the purchase terms and procedures in their form in 1898 when the Enabling Act was enacted, or as they may be changed from time to time.

Statutes which incorporate other statutes are considered either statutes of specific reference or statutes of general reference. 2B Singer, Sutherland Statutes and Statutory Construction, § 51.07, at 189-190 (5th ed. 1992) ("Sutherland"). A statute of specific reference, as its name implies, refers specifically to a particular statute by its title or section

number. Id., citing Salem & Beverly Water Supply Board v. Commissioner of Revenue, 26 Mass. App. Ct. 74 (1988). A general reference statute refers to the law on the subject generally. Id. The distinction between statutes of specific reference and statutes of general reference is significant in determining whether subsequent legislation is also incorporated.

> When a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. This is to be contrasted with adoption by reference of a limited and particular provisions of another statute, in which case the reference does not included subsequent amendments.

Id. at 190, citing George Williams College v. Village of Williams Bay, 7 N.W.2d 891 (Wisc. Sup. Ct. 1943). In other words, subsequent legislation is typically incorporated by the referencing statute if it is a statute of general reference, but not if the statute is one of specific reference. However, the above principles do not apply where "the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute." Sutherland § 51.08, at 192.

The Enabling Act contains a reference to limited and particular provisions of another statute, i.e., Sections 12-14 of St. 1891, c. 370. Thus, the Enabling Act is a statute of specific reference. However, the Enabling Act clearly provides that Stow shall purchase plant and property from HL&PD in accordance with the provisions of St. 1981, c. 370, §§ 12-14, "and any amendments thereof, and any general laws hereafter enacted relating to the purchase of electric light plants by a municipality...." Accordingly, the referencing language in St. 1898, c. 143, § 2 must be read to mean that the law is as St. 1891, c. 370 currently reads or as any general law on the subject reads. The current version of St. 1891,

c. 370, §§ 12-14 is codified at G.L. c. 164, §§ 42 and 43.[6] Thus, Sections 42 and 43 are controlling.

This conclusion is also supported by another well-settled canon of statutory construction: a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous. 2A Singer, Sutherland, § 46.06, at 119, citing School Committee of Brockton v. Teachers' Retirement Board, 393 Mass. 256 (1984); Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission, 394 Mass. 233 (1985); See also Martin v. Hunter, 1 Wheat (14US) 304 (1816); In Re Bergeron, 220 Mass. 472 (1915); Commonwealth v. Welosky, 276 Mass. 398 (1937). If the Department were to read the Enabling Act as not incorporating by reference the current version of St. 1891, c. 370, §§ 12-14, then the words "and any amendments thereof, of any general laws hereafter enacted" would be rendered superfluous. The Department therefore finds that Sections 42 and 43 are controlling in this matter.

C. Definition of Property

At issue is whether the term "property" has a limited definition to encompass only physical, tangible property such as physical utility plant, or whether its definition is broad so as to include intangible things such as power purchase contracts and generating unit ownership agreements (together "contracts"). The parties agree that "property" should at least be defined so as to include in the purchase all of HL&PD's physical plant located in

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[6] Section 14 of c. 370, St. 1891, was codified at G.L. c. 164, § 44, which was repealed by St. 1929, c. 379, § 3. Thus, only G.L. c. 164, §§ 42 and 43 are relevant.

Stow. The parties disagree as to whether SMED should be responsible for a portion of the contracts which HL&PD has entered into in order to serve its customers, including those who reside in Stow.

1. Positions of the Parties

a. SMED

SMED argues that the Enabling Act clearly defines the property for sale to be the tangible plant and property physically located within the municipality which has voted to establish its own municipal plant (SMED Pre-Hearing Brief at 15-16; SMED Initial Post-Hearing Brief at 11-13). According to SMED, HL&PD has no authority to "bind" Stow or SMED with respect to any generation plant physically located outside Hudson (SMED Pre-Hearing Brief at 12; SMED Initial Post-Hearing Brief at 9). In support, SMED argues that the statutory scheme limits Stow's exposure for the cost of HL&PD's generation acquisitions to generating units physically located within Hudson (SMED Pre-Hearing Brief at 12; SMED Initial Post-Hearing Brief at 9). SMED cites the following language of St. 1898, c. 143, § 1, as controlling:

> The town of Hudson may construct, establish and maintain in the town of Stow, a plant for the distribution of gas and electricity, to be manufactured at its central station in said Hudson, for the purpose of furnishing light, heat and power to the town of Stow for municipal use, and for the use of such of the inhabitants of the town of Stow as may require and pay for the same ... (emphasis supplied)

(SMED Initial Post-Hearing Brief at 9, citing St. 1898, c. 143, § 1). SMED argues that there has been no change or expansion to this limitation on HL&PD's authority to bind Stow

(SMED Pre-Hearing Brief at 12, citing G.L. c. 164, §§ 42 and 43; SMED Initial Post-Hearing Brief at 9, citing G.L. c. 164, §§ 42 and 43).

In SMED's view, intangible property rights, such as contract rights (and associated contract liabilities) should not be included in the sale between HL&PD and Stow because Stow would have no right to take by purchase such intangible rights and liabilities (SMED Pre-Hearing Brief at 16; SMED Initial Post-Hearing Brief at 13). SMED argues that, inasmuch as HL&PD has contracts with numerous third parties whose consent would be needed to "sell" portions of the contracts to SMED, the Department lacks authority to order such involuntary assignments (SMED Reply Brief at 2). SMED also argues that there is no proposal before the Department as to what property outside of Stow should be sold or assigned to SMED (SMED Reply Brief at 3-4). SMED notes there is only HL&PD's proposal for SMED's acquisition of a "slice of the system," without further definition, before the Department (id. at 4, citing Exh. H-5, at 3).

b. HL&PD

HL&PD argues that the property to be included in the purchase should include the physical plant constituting HL&PD's distribution system serving Stow and the portion of HL&PD's power supply portfolio that is used to serve Stow (HL&PD Pre-Hearing Brief at 7, 8). HL&PD argues that it should be uncontroverted that all of the physical plant and property constituting HL&PD's distribution system serving Stow must be included in the purchase (id. at 7). According to HL&PD, in determining what property should be included in the purchase, the Department should be guided by the following provision of Section 43:

> Such property shall include such portion of the property of such person or municipality within the limits of such town as is suitable for, and used in connection with, the generation or distribution of gas or electricity within such limits ....

(HL&PD Initial Post-Hearing Brief at 8, citing G.L. c. 164, § 43). HL&PD contends that this language is not exclusive and only states, at a minimum, what property must be included in the purchase (id. at 8). HL&PD asserts that the Legislature has delegated to the Department authority to determine, based on the "public interest," what other property should be included in the purchase. (id.).

HL&PD argues that intangibles, such as contractual rights and obligations, are property and should be included in the purchase (id. at 9). HL&PD further argues that the Supreme Judicial Court ("SJC") has defined "property" in its ordinary legal meaning as "extend[ing] to every species of valuable right and interest" (id., citing Titus v. Terkelsen, 302 Mass. 84, 86 (1938)). HL&PD also claims that many courts have recognized contracts, and power supply contracts in particular, as utility property and assets (id. at 9-10, citing Boston Elevated Railway v. Commonwealth, 310 Mass. 528, 555 (1942); Lynch v. United States, 292 U.S. 571, 579 (1934); United States v. Augspurger, 452 Supp. 659 (W.D.N.Y. 1978); Waspie Power & Light Company v. Tipton, 193 N.W. 643, 645 (Iowa 1923); Valparaiso Lighting Company v. Public Service Commission, 129 N.E. 13, P.U.R. 1921B 325, 335 (Indiana 1991) (parentheticals omitted)).

HL&PD contends that the language in Section 43 excluding from the sale certain intangibles, such as future earning capacity and goodwill, addresses the issue of the valuation of the property, not the threshold issue of what property is to be included in the

sale (HL&PD Initial Post-Hearing Brief at 10). Further, HL&PD argues that power contracts are not part of future earning capacity but rather are part of the property to be purchased or included in severance damages (id. at 11). By analogy, HL&PD asserts that in a statute that was enacted six years before the original version of Section 43, the Legislature provided that a water company could sell, among other things, rights and easements as part of the water company's property to be sold to the city, but excluded from the valuation of the property "future earning capacity, or future goodwill, or on account of the franchise of the company" (id. at 11, citing St. 1895, c. 451, § 16; Gloucester Water Supply Company v. Gloucester, 179 Mass. 365, 370 (1901)).

HL&PD also argues that the version of Section 43 that was in existence when the 1898 Hudson-Stow special act was enacted expressly includes intangibles in the concept of "property" (id. at 11). That statute provided that a special commissioner "shall thereafter adjudicate what property, real or personal, including rights and easements, shall be sold by the one purchased by the other" (id. at 11, citing St. 1891, c. 370, § 13 (emphasis added)). HL&PD contends that this language in the original version of Section 43 demonstrates that the Legislature intended the term "property" to include intangible property in the purchase (id. at 11-12).

With regard to SMED's argument that HL&PD could not "bind" Stow's customers under purchased power contracts because HL&PD was only authorized to serve Stow with electricity manufactured within Hudson, HL&PD states that it has explicit statutory authority to enter into purchased power contracts and to sell that power to the inhabitants of Stow (HL&PD Reply Brief at 9, citing G.L. c. 164, §§ 51 and 65). HL&PD also asserts that

under Section 3 of the act requiring HL&PD to serve Stow (St. 1898), there is no limitation that such power be generated within Hudson (id., citing St. 1898, c. 143, § 3). HL&PD argues that SMED's suggestion that HL&PD is limited to exclusively serving Stow from generators located within Hudson would contravene least-cost planning principles and prudent utility practice (id.). HL&PD contends that the language referenced by SMED is merely descriptive of the state of technology at that time (id. at 9).

c. MMWEC

MMWEC argues that the Section 43 sets out a minimum to be included in the purchase, i.e., any property within the limits of the purchasing town that is used in connection with the generation or distribution of electricity (MMWEC Initial Post-Hearing Brief at 10). MMWEC notes that the word "property" has a comprehensive meaning which extends to every species of valuable right, including such intangibles as power purchase contracts (MMWEC Pre-Hearing Brief at 4, citing Titus v. Terkelsen, 302 Mass. 84, 86 (1939); MMWEC Initial Post-Hearing Brief at 11, citing Boston Elevated Railway v. Commonwealth, 310 Mass. 528, 555 (1942) (other cites omitted)). MMWEC argues that this conclusion is buttressed by the fact that other sections of Chapter 164 which authorize a town to establish a municipal lighting plant utilize the term "plant," which denotes tangible property (id. at 5, citing G.L. c. 164, §§ 34-41). According to MMWEC, the Legislature's use of the broader term "property" in Section 43 indicates a different intention under this section (id. at 5).

MMWEC asserts that intangibles such as "future earning capacity," "goodwill" and "exclusive privileges derived from rights in the public ways" are excluded from the valuation

under Section 43 only because these things have limited or no value to the purchasing town (id. at 6, 12). In support, MMWEC argues that the future earning capacity of the selling town has limited value to the purchasing town because the purchasing town is limited by G.L. c. 164, § 58 in the return it may earn from the operation of a municipal light plant (id. at 12-13, citing Newburyport Water Company, 168 Mass. 541, 555 (1897)). With reference to goodwill or rights in the public ways, MMWEC argues that under G.L. c. 164, § 34, all towns are authorized to furnish electricity to their residents, and to erect power lines over public ways for that purpose (id. at 6, 12, citing G.L. c. 164, § 34)). Consequently, according to MMWEC, a selling company's goodwill or its rights in the public ways are of no value to the purchasing town (id., citing Newburyport Water Company v. City of Newburyport, 168 Mass. at 553; Gloucester Water-Supply Company v. Gloucester, 179 Mass. 365, 381 (1901)).

d. MECo

MECo argues that a broad definition of property, which includes power contracts, is appropriate and consistent with the Federal Energy Regulatory Commission's ("FERC") definition of "facilities" under Section 203 of the Federal Power Act (MECo Pre-Hearing Brief at 10, citing Enron Power Marketing, 65 FERC ¶ 61,305 (1993)). MECo claims that under the Federal Power Act, power supply contracts are fundamental to the sale of electricity and an essential asset if one is to be in the electric utility business (id. at 10). MECo also asserts that power supply contracts and entitlements can add to or subtract value from the utility's business, and should properly be addressed in the price and terms of any sale of that business (id.).

According to MECo, a broad definition of property is also consistent with the application of the broad public interest standard that the Department has used when evaluating other utility transactions (id.). As an example, MECo notes the Department's standard for evaluating mergers and acquisitions under G.L. c. 164, § 96, by which the Department "considers the potential gains and losses in a proposed merger and acquisition to determine whether the proposed transaction is in the public interest" (id., citing D.P.U. 93-167-A at 18-19 (1994)).

According to MECo, Section 43 provides the Department with ample discretion and authority to allow HL&PD full recovery of the above-market-value component of existing commitments made by HL&PD to serve Stow, which it terms stranded costs or stranded investment (id.). According to MECo, the issue of valuation of utility property under Section 43 should be resolved consistently with the policies for stranded investment recovery established by the Department in Electric Industry Restructuring, D.P.U. 95-30 (1995) and by FERC in its Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 70 FERC § 61,357 at 33,117-18 (1995) ("Open Access NOPR") (id. at 1). MECo notes that FERC has determined that recovery of legitimate and verifiable stranded costs should be allowed (id. at 1, citing NOPR at 142).

2. Analysis and Findings

As found above, (Section II.A.1.b.), Sections 42 and 43 govern the terms and procedure of this purchase. Therefore, the Department must interpret the meaning of the term "property" as used in Section 43. To give this term meaning, the Department looks to

the rules of statutory construction, judicial interpretations in analogous contexts, and the legislative intent behind this statute.

By statute, words and phrases shall be construed according to the common and approved usage of language, unless such words and phrases are technical in nature. G.L. c. 4, § 6, cl. 3. The SJC has held that the term "property," in its ordinary legal signification, "extends to every species of valuable right and interest, and includes real and personal property ...." Titus v. Terkelsen, 302 Mass. 84, 86 (1938) citing Boston & Lowell Railroad v. Salem & Lowell Railroad, 2 Gray 1, 35 (1854); Watson v. Boston, 209 Mass. 18, 23 (1911). The SJC also has held that intangibles such as a license to construct a railway structure are "property within the protection of article 10 of the Declaration of Rights of the Commonwealth and the Fourteenth Amendment to the Constitution of the United States." Boston Elevated Railway v. Commonwealth, 310 Mass. 528, 554-555 (1942). "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." Id. at 555, citing Lynch v. United States, 292 U.S. 571, 579 (1934).

The term "property," as used in Section 43, must also be given its customary and usual meaning. Such a meaning would extend to every type of valuable right and interest.

The Department has also considered the legislative intent behind the statute. In the original version of Section 43, St. 1891, c. 370, the Legislature expressly included intangibles in the concept of "property." That statute provided that, when parties fail to agree on what must be sold, a special commissioner "shall thereafter adjudicate what property, real or personal, including rights and easements, shall be sold by the one and

purchased by the other ...." St. 1891, c. 370, § 13. The Legislature's later exclusion of the words "real or personal, including rights and easements" cannot be construed as evidence of its intent to exclude such things from the purchase, but rather, can be construed as Legislative acknowledgement that the customary and usual meaning of the term "property" is sufficiently broad so as to include all classes of property.

The language in Section 43 which expressly excludes intangibles such as future earning capacity, goodwill, or exclusive privileges or rights in the public ways from the determination of value does not limit the definition of property to tangible property.[7] This exclusionary language functions to modify or limit the value of the property included in a purchase between municipalities and not to modify or limit the property itself included in that purchase.

Further, for several reasons, the Department is not persuaded by SMED's argument that, based on the language of the Enabling Act,[8] the property subject to purchase is limited

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[7] Specifically, Section 43 provides that a party may petition the Department for:

> a determination as to what property ought in the public interest to be included in the purchase and what price should be paid, having in view the cost of the property less a reasonable allowance for depreciation and obsolescence, and any other element which may enter a determination of a fair value of the property so purchased, but such value shall be estimated without enhancement on account of future earning capacity or goodwill, or of exclusive privileges derived from rights in the public ways ....

[8] St. 1898, c. 143, § 1, provides:

> The town of Hudson may construct, establish and maintain in the town of Stow, a plant for the distribution of gas and electricity, to be manufactured at its central station in said Hudson, for the purpose of furnishing light, heat and power to the town of Stow for municipal use,

(continued...)

to property physically located within the geographic limits of Stow. SMED's argument is flawed. The language in the Enabling Act which allows HL&PD to distribute electricity manufactured at its central station in Hudson is merely descriptive of the technology in 1898. It is doubtful that in today's market and industry, a provider of electricity could be limited to providing electricity that it generates itself. Moreover, the Enabling Act must be interpreted in light of other statutes which are not specifically related, but that apply to similar persons, things or relationships. 2B Singer, Sutherland at § 53.03, at 233. HL&PD is authorized to purchase electricity from and to contract for the purchase, sale or maintenance of equipment, supplies or materials with any town or corporation selling electricity. G.L. c. 164, § 51. It is clear from this legislation, enacted in 1977, that the Legislature intended to confer on municipalities the authority to contract for power in order to conduct the business of providing electric service. In addition, HL&PD's practice of contracting for power is consistent with the Department's least-cost planning principles. See G.L. c. 164, § 69I; Taunton Municipal Light Plant, D.P.U. 91-273/92-273 (Phase II) (1995). Thus, the HL&PD's authority to enter into contracts is not limited by the provisions of the Enabling Act and that such contracts may be considered "property" under Section 43.

Second, Section 43 provides that the property to be included in the purchase "shall include such portion of the property ... within the limits of" the purchasing town. When the word "include" is used, it is generally improper to conclude that what is not specifically

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[8](...continued)

> and for the use of such of the inhabitants of the town of Stow as may require and pay for the same ....

enumerated is excluded. 2A Singer, Sutherland at § 47.23, at 217; see also Connerty v. Metropolitan District Commission, 398 Mass 140, 149 n.8 (1986) (use of the word "including" in G.L. c. 258, §10(c) indicates that the enumeration of intentional torts in the section is not an all-inclusive list). Thus, the Department is not limited by the language of the Enabling Act or of Section 43, to property located within Stow in its determination of what property should be included in the purchase.

Based on our analysis of the language, intent and construction of the relevant statutes, the Department determines, in this Section, that the term "property" as used in Section 43 can be broadly construed to encompass every type of property, including tangible property such as HL&PD's physical plant located in Stow and intangible property, including contracts. Moreover, the Department determines that the property to be included in the sale between HL&PD and SMED is not limited by statute to that which is physically located in Stow. However, the Department's analysis does not conclude here. While the Department finds that contracts are within the definition of property, the Department, consistent with the language of Section 43, must analyze public interest considerations to determine what property should be included in the purchase.

D. Public Interest Considerations

1. Introduction

Section 43 states that a town which votes to establish a municipal lighting plant but fails to agree with its existing electric provider as to the property to be purchased, may petition the Department "for a determination as to what property ought in the public interest to be included in the purchase." G.L. c. 164, § 43. There is no dispute among the parties

that HL&PD's physical plant located in Stow should be included in the sale between HL&PD and SMED. However, within the context of the statute, an issue arises as to whether the Department should require SMED to purchase intangible property such as the rights and obligations of power supply contracts devoted to Stow. The Department will consider the public interest in determining whether the physical plant in Stow as well as the portion of HL&PD's power supply portfolio devoted to Stow should be included in the sale. The Department also addresses issues which arise with respect to certain insurance escrow funds held by HL&PD.

2. Positions of the Parties

a. HL&PD

HL&PD contends that failure to include SMED's portion of HL&PD's power supply portfolio, including contracts, in the property to be purchased would not be in the public interest because such failure would allow SMED to reap benefits at the expense of HL&PD ratepayers (HL&PD Initial Post-Hearing Brief at 12-13). HL&PD states, as an alternative to SMED's purchasing HL&PD's contracts, that SMED should pay stranded costs associated with the power supply portfolio acquired in order to serve Stow (id.). HL&PD defined stranded costs as costs incurred because of its obligation to serve that may be in jeopardy of being recovered because of the departure of a customer or because of the transition to a more competitive marketplace (Exh. HL&PD-5, at 8, 16, citing Stranded Costs: A Study on the Treatment of, and Jurisdiction Over, Electric Utility Costs During Transition to a More Competitive Industry, Edison Electric Institute; Exh. HL&PD-6, at 5).

HL&PD asserted that although Stow has always had the ability to municipalize, the opportunities that may now be available to Stow are a result of recent regulatory changes that have taken place, particularly the restructuring process (Exh. HL&PD-5, at 7).[9] HL&PD states that the issues associated with stranded costs and the obligation to serve are the same for investor-owned utilities and municipal utilities, and that the Department needs to establish policies and guidelines that address these issues for all electric customers in the Commonwealth (Exh. HL&PD-5, at 6-7).

HL&PD stated that Stow's departure from the HL&PD system will cause HL&PD to incur stranded costs in the amount of $20.44 million, consisting of $14.9 million in stranded power generation costs, approximately $5 million for distribution properties in Stow (calculated using HL&PD's reproduction cost new less depreciation method), and $653,943 in severance damages (Exhs. HL&PD-1, at 18, 23-24; HL&PD-5, at 16, 19). HL&PD used the terms damages, severance damages, stranded power supply costs and compensation interchangeably when referring to the amount that SMED should be required to pay (HL&PD Initial Post-Hearing Brief at 13-15).

HL&PD often uses both claims (that the contracts are property to be included in the sale and that SMED should pay stranded costs) together and does not provide any details of the proposition to require SMED to purchase its fair share of the contracts (id. at 13). HL&PD supports both claims with an analysis to determine the power supply costs stranded

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[9] HL&PD identifies as regulatory changes the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Energy Policy Act of 1992 ("EPAct"), the FERC Open Access NOPR, and states' initiatives that have stimulated competition (Exh. HL&PD-5, at 4-5).

as a result of Stow departing the HL&PD system ("Stranded Cost Analysis" or "SCA") (Exh. HL&PD-5, at 17).[10] HL&PD describes its analysis of stranded costs as calculating the differential between the price HL&PD could have purchased capacity for in order to meet the needs of the remaining system's load and the higher price HL&PD is "being forced to accept in the way of capacity by the departure of Stow" (Tr. 2, at 111-112).[11]

HL&PD maintains that any consideration of the public interest must take into account the possible harms and benefits to the public good (HL&PD Initial Post-Hearing Brief at 12-13, citing Grafton County Electric Light and Power Company v. New Hampshire, 77 N.H. 539 (1915)). HL&PD argues that public interest requires that the portion of its power supply portfolio that is dedicated to serve Stow (i.e., its "slice-of-system") should be included in the purchase because the Department has found that one customer class should not receive benefits at the expense of another (id. at 13, citing Investigation of Gas Utilities' Recovery of FERC Order 636 Transition Costs, D.P.U. 94-104-C at 19 (1994); D.P.U. 95-30 at 15 (1995)). HL&PD maintains that, pursuant to public service obligations, it was required to serve Stow at reasonable rates and to acquire a reliable portfolio over an appropriate planning horizon (id. at 13).

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[10] According to HL&PD, the SCA incorporates all costs associated with the generation and transmission costs of HL&PD's resources and the depreciation and operating expenses related to HL&PD's investments (Exh. HL&PD-5, at 17).

[11] The SCA models the total power supply costs of the HL&PD system, with and without Stow as a customer, for the period 1995 through 2018 (Exh. HL&PD-5, at 17, Table A). The SCA suggests that the departure of Stow from the HL&PD system will cause "stranded costs" of $14.9 million in 1995 dollars (Exh. HL&PD-5, at 19, Table A).

In response to SMED's contention that no plant is actually stranded by Stow's departure because of potential mitigation,[12] HL&PD contends that, in calculating stranded costs, it has accounted for the mitigation of the load stranded by Stow's departure by reflecting the economic value of the use of the excess capacity in its analysis (id. at 51, citing Tr. 3, at 49-50). In HL&PD's case, the "use" of the capacity is a result of internal growth (Tr. 3, at 50).[13] HL&PD maintains that the SCA calculated "the revenues that would have been received from system growth and used those revenues to offset fixed charges being stranded by Stow's departure" (HL&PD Initial Post-Hearing Brief at 51). HL&PD concludes that, because the entire load stranded by Stow is expected to be utilized to meet forecasted growth in the system, HL&PD has mitigated the resulting stranded costs to the extent possible (id.).

However, HL&PD asserts that it is important to distinguish between stranded megawatts and stranded dollars (id. at 50, citing Tr. 2, at 112). HL&PD testified that it is

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12 The SCA indicates that, either with or without Stow as a customer, additional resources would need to be procured to meet the projected load growth of the HL&PD system and to replace expiring contracts (Exh. HL&PD-5, Tables B & C; Tr. 2, at 215). HL&PD indicated that the incremental resources that would fulfill the needs of load growth and expiring contracts on the HL&PD system have not yet been procured (Tr. 2, at 215-216).

13 HL&PD states that if Stow remains on the HL&PD system, approximately 14 megawatts ("MW") of new resource capacity are needed for 1996, with growth continuing through the analysis period (Exh. HL&PD-5, Table B at 1). The SCA indicates that HL&PD's contract with Canal #2, representing approximately 3 MW of resource, terminates during 1995 (Exh. HL&PD-5, Table B at 1). According to HL&PD, if Stow departs the HL&PD system, approximately 8 MW of new resources are needed for 1996, with growth continuing throughout the analysis period (Exh. HL&PD-5, Table C at 1).

inappropriate to view stranded costs in terms of excess plant; HL&PD maintains that the Department has not found it appropriate to define stranded costs in terms of excess capacity (id. at 50, citing D.P.U. 95-30, at 32; Tr. 2, at 194). Rather, the question is whether remaining HL&PD customers will be required to incur increased costs as a result of Stow's leaving the system (Exh. HL&PD-6, at 4-5). HL&PD testified that its stranded cost analysis did not include mitigation (i.e., the sale of excess capacity) because the remaining customers on the HL&PD system are able to absorb the excess capacity (Tr. 2, at 111-112). HL&PD contends that although HL&PD may experience load growth simultaneous with Stow's departure, HL&PD's embedded costs and Stow's obligation to pay those costs still exist (HL&PD Initial Post-Hearing Brief at 50).

In response to SMED's argument that the uneconomic portion of HL&PD's power supply portfolio should not be recoverable by HL&PD because it represents a routine business risk, HL&PD asserts that the FERC has rejected characterization of a utility's long-term power commitments as a typical business risk (id. at 47, citing Open Access NOPR at 33,101). HL&PD contends that it is evident that it never assumed the risk of stranded power supply costs because it was never compensated for such risk, and noted that the rate of return it earns has been statutorily capped at eight percent (id. at 48, citing G.L. c. 164, § 58). HL&PD further contends that the risk of stranded costs would represent an asymmetric risk, in that HL&PD does not have the opportunity to realize windfall benefit greater than eight percent should its power supply portfolio increase in value (id. at 49).

HL&PD notes that FERC evaluates the reasonableness of a utility's expectations to continue to serve a specific customer based, in part, on the length of time the utility has

provided service to the customer, and whether a contract with a notice provision has been repeatedly renewed (id. at 48, citing Open Access NOPR at 33,117-18). HL&PD contends that, because it provided service to Stow on a continuous basis for almost 90 years, it had a reasonable expectation that Stow would continue to purchase power from HL&PD (id. at 48). HL&PD maintains that the power supply commitments for which it seeks cost recovery were secured prior to 1986, and that there is no evidence that HL&PD had notice of Stow's likely departure at that time (id.).

HL&PD argues that requiring SMED to pay a portion of HL&PD's power supply costs is consistent with the public interest and the Department's goals for industry restructuring because such payment would ensure that (1) as a departing customer, SMED would bear the consequences of its decision,[14] and (2) one customer class would not benefit at the expense of another[15] (HL&PD Reply Brief at 20, citing D.P.U. 95-30, at 15). HL&PD asserts that SMED's proposal will require HL&PD's remaining ratepayers to pay increased costs because there are no shareholders who might absorb these costs (HL&PD Initial Post-Hearing Brief at 49). HL&PD maintains that SMED's intended departure from

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[14] HL&PD asserts that departing customers should be required to bear all costs for which they are responsible in order to send accurate price signals for evaluating supply alternatives and to avoid uneconomic or inefficient bypasses (HL&PD Initial Post-Hearing Brief at 14).

[15] HL&PD contends that, if the Department does not require SMED to pay damages for its stranded power supply costs or to purchase a portion of HL&PD's power supply portfolio, SMED would be able to reap significant benefits, such as acquiring power at low rates in the current surplus market, at the expense of the people of Hudson, who would be left with the more expensive power (HL&PD Initial Post-Hearing Brief at 20, citing Exh. HL&PD-5, at 10-11).

the HL&PD system will not promote competition in the generation sector (HL&PD Reply Brief at 20). HL&PD further contends that because SMED entered into a seventeen-year, all-requirements contract with Northeast Utilities/Littleton Electric Light Department ("NU/LELD")[16] while HL&PD will continue to make competitive purchases in the market, SMED's departure may have a negative impact upon competition in the electric generation industry since SMED will not actively participate in market transactions (id. at 19). HL&PD argues that if the Department interprets Section 43 to allow Stow to depart the HL&PD system without paying stranded costs, communities across Massachusetts that are served by either municipal or investor-owned electric utilities would be encouraged to exploit this situation to take advantage of low, short-term market rates at the expense of the utilities' remaining customers (HL&PD Initial Post-Hearing Brief at 49).

In reference to SMED's arguments that HL&PD cannot prove that its power supply decisions were prudent, HL&PD maintains that this issue is immaterial in light of the Hearing Officer's ruling that the prudence of HL&PD's power supply acquisitions is not relevant to this proceeding (HL&PD Reply Brief at 24). HL&PD further argues that "information" referred to by SMED regarding the prudence of HL&PD's power supply acquisitions was never presented on the record (id. at 25).

With regard to an insurance escrow fund established in December 1984, HL&PD stated that it is held to insure against rate shock (Exhs. DPU-56; DPU-95). The fund has been used over the years to pay bills, reduce and stabilize rates, and protect against wide

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[16] SMED has negotiated to purchase its power supply from Littleton Electric Light Department, which in turn procures power from Northeast Utilities (Tr. 4, at 10-11).

variations in power purchase costs (Exhs. DPU-56; DPU-95). HL&PD reported that the fund would also be used to pay MMWEC approximately $1.4 million, as HL&PD's "step-up" share of Vermont's share of Project No. 6[17] (Exh. DPU-56; Tr. 3, at 30-31). In addition, HL&PD stated that as of May 1995, the fund also contains $3.4 million associated with the Eastern Maine Electric Cooperative settlement, which is being returned over time to HL&PD customers (Exh. DPU-56). HL&PD stated that the insurance escrow fund is for the benefit of the HL&PD ratepayers and is not specifically dedicated for the benefit of any one group of customers (id.).

HL&PD stated that SMED is entitled to a portion of the insurance escrow funds only if SMED's customers are willing to pay for their share of the power-supply costs in the form of slice-of-system damages or other damages that have been incurred to meet the projected requirements of the system (Exh. HL&PD-6, at 7-8). HL&PD stated that this share is approximately $5.1 million (Tr. 3, at 30).[18] Subject to this condition and based on SMED's

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[17] The participants in MMWEC's projects have established contractual arrangements whereby, if a single participant or group of participants should default on the agreement, that share of the project and associated payment responsibilities would be allocated to the remaining participants (MMWEC Initial Post-Hearing Brief at 18-19). That is, the remaining participants' ownership would be subject to a step-up, or an increased obligation, if HL&PD defaults on Project No. 6 (id.). The step-up provision caps the level of additional plant ownership at 25 percent (id.).

[18] The $5.1 million is the total of the settlement monies minus the $1.4 million (Tr. 3, at 30). HL&PD's witness explained that, as of June 1, 1995, the insurance escrow account was approximately $8 million, consisting of $4.7 million of settlement funds associated with Seabrook, $1.8 million in settlement funds for Pilgrim Nuclear Plant, $1.5 million of retained earnings (Tr. 3, at 29-30). In addition, he noted that $1.4 million relating to Vermont Project No. 6 would also need to be funded from this account (id.). However, because HL&PD's obligation to MMWEC for the

(continued...)

load, HL&PD calculated the amount to be returned to SMED which would be approximately 12.6 percent of $5.1 million or $642,600 (id. at 29-31).

b. SMED

SMED posits that while it may be in the public interest to include the physical plant located in Stow in the purchase, the public interest considerations argue against both the inclusion of the contracts in the purchase and the associated costs as damages[19] (SMED Initial Post-Hearing Brief at 12-13, 47). SMED asserts that even if the Department had statutory authority to include the contracts as property in the purchase (or to award HL&PD damages related to these claimed stranded costs), five public interest considerations argue against HL&PD's claim that it be compensated for the costs associated with these contracts (id. at 47).

First, SMED contends that HL&PD's claim would preclude competition in the electricity industry, undercutting a goal the Department has sought to establish for several years (id.). SMED asserts that, if the Department accepted HL&PD's position, no municipalization pursuant to Section 43 would ever occur (id. at 48). SMED contends that the Department's commitment to competition in the electric industry requires that the Department not allow claims that exceed the value of switching suppliers (id.).

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[18](...continued)
Vermont Project No. 6 step-up share is still being litigated, HL&PD indicated that a percentage of the $1.4 million would also be owed to SMED if HL&PD prevails in the case (id.).

[19] SMED's position will not be repeated in Section III.B.2., below.

Second, SMED argues that HL&PD's position regarding the property to be included appears to "reward incompetence and punish competence" (id.). SMED maintains that, should the Department accept HL&PD's presentation, the Department would be instituting a policy that awards higher damages to electric power systems with poor records of resource planning than to those with good records (id. at 48-49). Further, SMED maintains, the Department would be instituting a policy where the party with control of the resource portfolio planning process, HL&PD, would bear no risk while the party with no control of the planning process, SMED, would bear all of the risk (id. at 49).

Third, SMED contends that HL&PD cannot prove that its resource portfolio decisions were prudent (id.). SMED maintains that HL&PD's investments in nuclear capacity (particularly the Seabrook nuclear plant), and the level of investment in such capacity relative to HL&PD's load, were clearly imprudent (id. at 52). SMED notes that the Hearing Officer's Ruling of August 10, 1995 struck certain evidence from the record on the grounds that the Department "`lacks the authority to evaluate the prudence of municipal light plant supply acquisitions and that the prudence concept has no application in the municipal context'" (id. at 53 n.36, citing Hearing Officer Ruling dated August 10, 1995). SMED argues that if the Department lacks authority to evaluate prudence in the context of municipal light departments, then the Department lacks the authority to order compensation for imprudently-incurred stranded costs (id.).

Fourth, SMED asserts that HL&PD's claim of $20.44 million,[20] which includes the

[20] HL&PD proposes that Stow pay an exit fee of $20.44 million, consisting of (continued...)

value of the physical property assigned to Stow, is unreasonable in light of the size of Stow's load (currently 6.9 MW at peak) and in light of the financial burden it would impose upon Stow's ratepayers (id. at 49-50).

Fifth, SMED argues that HL&PD now carries large cash balances, which are the result of the settlement of various disputes over power supply costs and a return of dollars that were paid to MMWEC for power supply, referred to as "The Flush" (Exh. SMED-3, at 11), and which indicate that HL&PD has overbilled Stow in the past (SMED Initial Post-Hearing Brief at 50). For a discussion of "The Flush," see Section III.B.2, below.

Although not termed "public interest considerations," SMED raises additional issues regarding the appropriateness of requiring SMED to purchase a slice of HL&PD's system or awarding HL&PD stranded costs associated with its resource portfolio (id. at 54). SMED testified that the departure of its load from the HL&PD system will not cause HL&PD to be left with any excess plant, since the loss of load will be completely mitigated by the additional load that is being added in Hudson by the Digital Equipment Company chip plant (Exh. SMED-3, at 6). SMED argues that HL&PD has no stranded generation assets, and in fact, will need to procure additional resources to meet load growth, even if Stow departs the HL&PD system (SMED Initial Post-Hearing Brief at 54). Therefore, SMED contends that

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[20](...continued)
$14.9 million in stranded power generation costs, approximately $5 million for distribution properties in Stow (calculated using HL&PD's reproduction cost new less depreciation method), and $653,943 in severance damages (Exhs. HL&PD-1, at 18, 23-24; HL&PD-5, at 19).

under the SCA, HL&PD's calculation of stranded costs is faulty since it essentially ignores the offsetting effects of additional load on the HL&PD system (id. at 55).

SMED maintains that HL&PD's stranded cost calculations are improper because they include no mitigation (id. at 60, citing Tr. 2, at 111-112). SMED argues that under HL&PD's method of calculating stranded costs, mitigation is irrelevant and, in fact, cannot occur; even if HL&PD added 20 MW of load, the calculation would still show damages (id., citing Tr. 3, at 80). SMED contends that the failure of HL&PD's analysis to address mitigation directly contradicts the Department's recently-stated policy that stranded cost recovery must be net of reasonable mitigation efforts (id. at 61, citing D.P.U. 95-30, at 37).

SMED also argues that HL&PD's stranded cost damage claim is improper because it is based upon an improperly-selected time period (i.e., 1995-2018) (id. at 60). SMED maintains that the 24-year time period was selected by HL&PD because the calculated annual costs turn into benefits at the end of the time period analyzed (id.). SMED asserts that it would be inappropriate for the Department to accept an analysis that pertains to a time period that measured only costs but not benefits (id.).

In arguing against HL&PD's stranded cost claim, SMED contends that HL&PD does not have an exclusive franchise in the Stow service territory, and thus, only had a right to serve Stow until Stow took two town meeting votes not less than two and not more than 13 months apart (id. at 61, citing G.L. c. 164 § 36). SMED calculates that HL&PD had, in effect, an expectation that it would serve Stow until a termination process took place. This

termination process would be no more than approximately 30 months (id. at 61).[21] SMED indicates that stranded cost recovery is dependent on perpetual and exclusive franchise rights and, since there is no factual or equitable basis to determine that HL&PD had an expectation that it would serve Stow exclusively or permanently, SMED concludes that HL&PD's stranded cost recovery claim is invalid (id. at 61-62).

SMED also asserts that the SCA produces perverse incentives in that the calculation would assess higher damages if SMED had negotiated a less expensive contract with NU/LELD, and lower damages if SMED had negotiated a more expensive contract with NU/LELD (id. at 56). This differential occurs because the SCA incorporates SMED's contract price as the proxy for the market price, assuming that HL&PD would be able to secure the same price as SMED, and therefore would be able to pass the savings (the difference between embedded costs and market price) to all of its customers (Exh. HL&PD-5, Table A; Tr. 3, at 76-77).

c. MMWEC

MMWEC argues that, pursuant to the requirement of Section 43 to consider the public interest in its determination of what property to include in the sale, the Department must consider the interests of HL&PD and others, including MMWEC (MMWEC Initial Post-Hearing Brief at 14). MMWEC argues that SMED should "purchase . . . contract obligations," "take that portion of Hudson's power purchase contracts . . . allocable to"

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[21] The 30-month calculation is based on 13 months required for the two town votes, five months (or 150 days) required for the negotiation period, and 12 months for the Department to make a determination regarding the property and price to be purchased. G.L. c. 164, §§ 42, 43.

Stow, and "compensat[e] Hudson for contract obligations," but does not explain or distinguish between the meanings of these phrases (id. at 15, 16, 20). MMWEC contends that the legal precedent states that there is little or no logic in a result that would favor one public entity at the expense of another in this matter (id. at 15).

MMWEC argues that the Department's decision should not be controlled by the possibility that, if HL&PD is awarded the payment it seeks, SMED's ratepayers may incur a greater burden after departing the HL&PD system than if SMED remains on the HL&PD system (id.).

MMWEC asserts that the public interest requires utilities to recover costs associated with contractual commitments undertaken pursuant to legal obligations to provide electric service to their customers (id. at 16, citing D.P.U. 95-30, at 29, 35). MMWEC maintains that, consistent with D.P.U. 95-30, "such recovery is appropriate because it ensures the reliability of contractual commitments and the equal treatment of similarly situated utilities" (id., citing D.P.U. 95-30, at 35).

MMWEC notes that, because HL&PD is a municipal entity, it does not earn a rate of return on its power supply investments (id.). MMWEC argues that, unlike investor-owned utilities which are compensated for higher levels of risk that they assume, HL&PD has not earned a return for the risk it undertook to service Stow (id.).

MMWEC argues that a determination that SMED is not required to purchase contract obligations that are allocable to Stow would likely impair MMWEC's credit rating because MMWEC's credit rating depends, in part, on the credit quality of the participants in

MMWEC's projects, including HL&PD (id. at 17).[22] MMWEC contends that the credit quality of the participants in Project No. 6 is particularly important because that project represents MMWEC's largest share of Seabrook Unit 1, and the default of the Vermont and Maine participants in Project No. 6 resulted in a step-up increase in costs of nearly 25 percent for the remaining participants (id. at 17-18). MMWEC maintains that any decision by the Department in this proceeding that would threaten HL&PD's financial stability would thus affect MMWEC and MMWEC's ability to service other municipal light plants in Massachusetts and neighboring states and would be contrary to the public interest (id. at 18). MMWEC notes that the Massachusetts legislature established MMWEC to perform an essential public function and that the SJC has recognized that MMWEC functions for the public benefit (id., citing St. 1975, c. 775, § 2; Hull Municipal Lighting Plant v. Massachusetts Municipal Wholesale Electric Company, 399 Mass. 640, 641 (1987)). MMWEC concludes that any impairment of MMWEC's ability to finance and obtain economical power supplies for its participants is contrary to the public interest as identified and enunciated by the Legislature (id.).

2222 MMWEC is a public corporation which has no stockholders (Exh. MMWEC-1, at 1). Its power supply program is financed entirely through the issuance of revenue bonds which are secured by the revenues derived primarily from all of its power sales agreements ("PSAs") with various municipalities and other entities (id.). MMWEC explained that it had issued bonds to acquire ownership interests in Seabrook Unit 1 Nuclear Plant ("Seabrook") (MMWEC Initial Post-Hearing Brief at 17). HL&PD entered into PSAs with MMWEC in order to fulfill its obligation to serve its load including Stow (id.).

d. MECo

MECo notes that the Department stated in D.P.U. 95-30 that it is "in the public interest to `provide utilities a reasonable opportunity to collect stranded costs'" (MECo Initial Post-Hearing Brief at 2-3, citing D.P.U. 95-30, at 33). MECo contends that the Department's public interest finding in D.P.U. 95-30 applies directly to its determination under Section 43 of the property and value at issue in this case, "and provides the rationale for the recognition of the commitments and costs associated with HL&PD's power supply" portfolio (id. at 3-4). MECo argues that, consistent with D.P.U. 95-30, the Department should make a determination that does not "`assign to other customers the stranded costs that are appropriately allocated to a customer with options'" (id. at 4, citing D.P.U. 95-30, at 38).

MECo maintains that the Department should find that the public interest requires that an appropriate share of HL&PD's stranded costs must be allocated to SMED, the only customer with options in this case (id.). MECo asserts that this approach is necessary to assure that HL&PD's stranded costs receive equal consideration in this case with the stranded cost proposals that will be filed in compliance with D.P.U. 95-30 (id.). MECo also states that this approach is necessary to provide consistency with the FERC's proposal for stranded cost recovery associated with municipalization and open access in the Open Access NOPR which, according to MECo, "establishes that utilities will be allowed to recover stranded costs from departing municipal customers through a wires charge" (MECo Pre-Hearing Brief at 7, citing Open Access NOPR at 146). Also, MECo describes FERC's standard as stating that, as a matter of causation and fairness, the stranded costs associated with the development

of competitive wholesale markets should be assigned to the departing customers (id., citing Open Access NOPR at 155, 175-178). MECo further argues that a Department determination in this proceeding that SMED should pay an appropriate share of HL&PD's stranded costs would be consistent with the Department's policies for recovery of the transition costs in the gas industry and for sunk costs in the integrated resource management process (id. at 6, 9, citing D.P.U. 94-104-C at 21 (1995); D.P.U. 89-239, at 13-16 (1990); D.P.U. 86-36-C at 81-86 (1988)).

3. Analysis and Findings

The Department has determined that Section 43 is the controlling legislation in this case, and thus, we are required to make a determination "as to what property ought in the public interest to be included in the purchase." In so doing, the Department relies on its broad authority to balance competing interests. Cambridge Electric Light Company, D.P.U. 94-101/95-36, at 78 (1995); Commonwealth Electric Company v. Department of Public Utilities, 397 Mass. 361, 369 (1986); Lowell Gas Light Company v. Department of Public Utilities, 319 Mass. 46, 52 (1946).

There are several properties at issue in this proceeding: physical property located in Stow, contracts and the assignment to Stow of the associated slice-of-system, and the insurance escrow fund which is related to contracts. In determining whether it is in the public interest to include these properties in the transfer to Stow, the Department must take into account various concerns regarding this potential purchase: the duplication of plant (e.g., identical parallel equipment that SMED might choose to install if HL&PD's equipment is unavailable or overpriced) and the closely related issue of the creation of excessive unused

plant; the Department's authority to assign contracts; the effect of such assignment on competition in power markets; issues surrounding stranded cost assessment, including the applicability of our electric industry restructuring principles and their application here;[23] and the impact of the sale on MMWEC's credit rating.

There is no dispute that HL&PD's tangible assets geographically located in Stow should be included in the sale between HL&PD and SMED. Given that such a transfer of property would avoid plant duplication and the creation of excessive unused plant, the Department finds that it is in the public interest to include all physical property located in Stow in the sale between HL&PD and SMED.

The most controversial issue the Department must decide is whether the contracts should be included in the purchase. In Section II.C.2, above, the Department found that the term property applies to intangible property such as these contracts. However, there are several problems in applying that property concept here. First, the statute was not designed to address the special circumstance in which ownership of portions of contracts would be transferred or assigned from a seller to an unwilling buyer; such a transfer may not be feasible. An assignment is a contract. Larabee v. Potvin Lumber Company, Inc., 390 Mass. 636 (1983). A fundamental principle of contract law is that binding obligations can only arise as a result of voluntary undertakings. Farrington v. Tennessee, 95 U.S. 679, 685 (1978). When a contract as a whole is assigned, there is no separation between the benefits

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[23] Among the specific issues we address are (1) Stow's opportunity to depart as a result of the restructuring process; (2) efficiency in the electric industry; (3) HL&PD's ability to mitigate potentially stranded costs; and (4) potential rate impact for any ratepayers.

and the burdens. Chatham Pharmaceuticals, Inc. v. Angier Chemical Company, 347 Mass. 208 (1964). Thus, SMED would have to be willing to accept the obligations as well as the benefits of the contracts at issue. Clearly, SMED is unwilling to do so. In this context, the Department does not have authority to assign a contract to a party who is not willing to accept the obligation of that contract.[24]

In addition, it may not be possible to track power supply contracts to the customers who have been the beneficiaries of them. In many instances, contract costs would have to be identified and divided into parts proportional to the amount of power used by each customer or group of customers. The Department also notes that if it were to require SMED to purchase the contracts, participants in the power market might be discouraged from signing contracts, given the potential for subsequent Department intervention. Contracts are a market mechanism for agreements between willing parties and not a tool of regulation. This type of Department intervention could hinder competition. For the reasons stated above, the Department finds that it is not in the public interest to include the assignment of the power purchase contracts or the associated slice-of-system in the property to be purchased by Stow.

However, HL&PD states its claim regarding the contracts not only as a claim for property to be purchased by Stow but also as a claim for severance damages to be paid by Stow and as a claim for stranded cost recovery pursuant to D.P.U. 95-30. It appears that the essence of HL&PD's claim is not that the contracts should be assigned to Stow, but rather

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[24] Compare the Department's authority regarding contracts under the regulations regarding the Integrated Resource Planning contracting process, 220 C.M.R. §§ 10.00 et seq.

that HL&PD should be compensated for the potentially stranded costs associated with those contracts. The Department must decide, as a general matter, whether it is possible for utilities (including municipal light departments) to receive compensation for stranded costs associated with a customer's departure under Section 43. While a narrow reading of the statute might lead to the conclusion that there should be no payment by the departing entity where no property is transferred, it is appropriate to interpret the statute more broadly. While the term property implies ownership, there may be situations in which a party may not wish to obtain any ownership interests but in which the Department finds it is in the public interest to permit stranded cost recovery.

In this case, HL&PD has raised the Department's restructuring policy as a rationale for its recovery of stranded costs. The Department has found that the recovery of stranded costs is in the public interest because such recovery will advance competition as a means to increase efficiency in electric generation and service provision. D.P.U. 95-30, at 34-36 (1995); Cambridge Electric Light Company, D.P.U. 94-101/95-36, at 80 (1995). In D.P.U. 95-30, at 29, the Department established guidelines on the recovery of stranded costs by investor-owned utilities. Specifically, the Department found that electric companies should have a reasonable opportunity to recover net, non-mitigable, stranded costs associated with commitments previously incurred pursuant to their legal obligations to provide electric service. Id. The Department has also found that the design of a stranded cost recovery mechanism must include mitigation and that utilities must take all practicable measures to mitigate stranded costs during the transition. D.P.U. 95-30, at 29, 37. In addition, the Department stated that stranded cost recovery mechanisms should be non-bypassable and

non-discriminatory and should not assign to other customers the stranded costs that are appropriately assigned to a customer with options. Id. at 38.

The Department's Order in D.P.U. 95-30 did not distinguish between investor-owned utilities and municipal electric systems. A fair and logical policy regarding stranded costs requires that municipal electric systems be treated similarly to investor-owned utilities, except where substantial differences warrant different treatment. The Department finds that, consistent with the requirement of Section 43 that it consider the public interest in determining what property ought to be included in the purchase, the Department has legal authority to base its determination, in part, upon a consideration of established restructuring principles on the recovery of stranded costs. See D.P.U. 95-30, at 31-37.

In D.P.U. 95-30, at 35, 38, the Department addressed equity and responsibility as considerations in stranded cost recovery. The Department has the obligation to protect ratepayers and to ensure that all customers have opportunities to benefit from competition and that no one customer class benefits at the expense of another. The Department also stated that a goal of the restructuring proceeding was to develop an efficient industry structure. D.P.U. 95-30, at 13. Therefore, the Department must consider HL&PD's claim for contract costs in light of these principles.

Among the public interest factors we must consider in this case is how to enable a municipality to take advantage of a statutory right to separate itself from a utility, while balancing the interests of the municipality and the utility. Although the option to municipalize under Section 43 has been available to Stow for approximately 90 years, it is

clearly the current situation in the electric industry[25] that is driving its petition. HL&PD asserts that Stow's municipalization could result in a significant loss of customer base and revenue to HL&PD. If HL&PD might later be unable to recover the revenue that is necessary to cover its embedded costs, then a stranded cost recovery charge may be appropriate; therefore, we next address whether the recovery is warranted.

In order to establish that stranded cost recovery is warranted, a utility must demonstrate that net, non-mitigable stranded costs exist. See D.P.U. 95-30, at 29. Implicit in this standard is that the costs must be documented. Also, under D.P.U. 95-30, those who historically provided electricity to a departing customer must clearly demonstrate that all available and reasonable means will be taken to mitigate the burden placed on customers to pay for the stranded costs. Id. at 37. The duty to mitigate is the duty to minimize stranded costs through a range of subordinate actions. Such actions can include reducing fixed costs (e.g., through the write-off, accelerated depreciation, or sale of uneconomic or excess production capacity, negotiating contract terminations), increasing sales (i.e., spreading fixed costs over a greater number of units of production), selling new services, and selling ancillary services.[26]

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[25] In D.P.U. 95-30, at 7, the Department identified increased wholesale competition, advances in combined-cycle gas-turbine technology, and the installation of on-site generating units by a few retail customers as factors that have stimulated retail competition. The Department also recognized the difference between current "retail rates based on long-run historical costs and short-run wholesale prices that are low due to excess capacity" as a factor that has contributed to the move toward competition. Id. at 7 n.7.

[26] The Department's definition of mitigation in Electric Industry Restructuring, (continued...)

There are several problems with HL&PD's stranded cost presentation. The principal flaw is that HL&PD has not established that stranded costs exist. HL&PD's analysis focused on what it considered to be above-market costs potentially stranded by Stow's departure. HL&PD's calculation is problematic because HL&PD calculated stranded costs by considering costs over the 24-year period that it expected Stow to remain its customer; however, HL&PD did not adequately demonstrate why the 24-year period would be appropriate to a stranded cost calculation. Also, HL&PD used the price that SMED secured in its contract with LELD as a proxy for the market price against which HL&PD measured its above-market costs. This market price proxy is problematic for several reasons, including the fact that it provides an extremely narrow view of the market. In addition, the term of SMED's agreement with LELD is 17 years, while HL&PD could be securing purchases of various amounts for differing amounts of time, which could affect any stranded cost level. More importantly, above-market costs do not equal stranded costs; in order to establish that costs are stranded, it must be demonstrated that they would not be recovered. See D.P.U. 95-30, at 32.

Moreover, HL&PD has not made a showing that it has taken all available and reasonable means to mitigate, nor has it outlined any efforts it plans to take to mitigate any

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[26](...continued)
D.P.U. 95-30, at 37 n.28, stated that "[m]itigation measures could include the following: (1) streamline existing operations; (2) identify supplemental revenue streams to support existing generating facilities; (3) sell excess generating facilities; and (4) accelerate depreciation and asset writedown provisions. See, e.g., Trigen-Boston Energy Corporation Initial Comments at 5."

above-market price portion of the contracts that it secured in order to serve Stow.[27] The mitigation that occurs in this case, which is discussed below, seems to be more the result of fortuitous events than direct efforts by HL&PD. The Department cannot assign costs that have not been adequately documented or which HL&PD has not made any attempts to mitigate. Because HL&PD did not sufficiently demonstrate that any stranded costs would be incurred as a result of Stow's departure and made no presentation regarding its attempts to mitigate, the Department finds that no stranded cost recovery is warranted.[28]

Even if we were to accept HL&PD's claim that potential above-market costs exist, the Department would not allow their recovery as stranded costs because, based on the evidence presented, they are mitigated by additional loads and contract terminations. The record indicates that HL&PD will need to acquire additional resources in the near term regardless of whether Stow departs the HL&PD system. The record further indicates that HL&PD did not consider its attraction of incremental loads to equate to mitigation of the fixed costs incurred to serve Stow. HL&PD's SCA quantifies the difference between average, embedded costs and incremental, marginal costs. Given offsetting new loads and contract terminations, based on the SCA, the Department has calculated that costs allocated to remaining HL&PD

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[27] This is despite the fact that HL&PD indicated that it first became aware of SMED's interest in leaving the system through an October 18, 1991 article in the Stow Villager (Exh. DPU-3). HL&PD stated that it was not aware of any prior attempts by Stow to leave the system (id.).

[28] The Department notes that the same conclusion would have been reached had we analyzed stranded costs as economic severance damages, as HL&PD contends would be allowed under Section 43. The Department would have found that no such damages should be awarded to HL&PD because the record does not establish that these damages are direct and certain. See Section III.C.

ratepayers, when adjusted for inflation, will actually decrease over time. Based on the record, the Department finds that as the HL&PD system grows, the fixed costs that were historically paid by Stow will be paid for by the revenues from additional loads in the system. Importantly, because of these factors, HL&PD customers will not incur increasing costs relative to the costs prior to the departure.

Regarding MMWEC's argument for assignment of stranded cost to Stow, while the Department recognizes that a default on Project No. 6 by HL&PD could hurt MMWEC's credit rating and increase the step-up for the other Project No. 6 participants, there is no evidence that the departure of Stow from the HL&PD system will force HL&PD to default on its agreements with MMWEC. Therefore, the failure of SMED to purchase HL&PD's contracts does not call into question MMWEC's credit stability. Because the record indicates that the HL&PD system will have no excess capacity as a result of Stow's departure, HL&PD will not be disadvantaged in terms of useful capacity and it should be able to honor its existing commitments.

Thus, the Department finds as a general matter that the consideration of stranded costs in this situation would be appropriate and consistent with the broader intent of the statute and our restructuring policy. However, in this particular instance, the Department finds several reasons for not assigning a stranded cost charge, including: (1) HL&PD has not clearly established that stranded costs exist; (2) HL&PD has not made a showing that it has taken all available and reasonable means to mitigate; (3) HL&PD has not made a showing that it will take all available and reasonable means to mitigate; and (4) even if we were to accept HL&PD's presentation of above-market costs, it appears that the costs would not be

stranded. Accordingly, the Department finds that it is not in the public interest to require Stow to pay HL&PD its historical portion of fixed costs or to purchase a slice-of-system.

With regard to the issue of HL&PD's insurance escrow fund, which is related to the recovery of contract costs, the Department agrees that the purpose of the account is to protect against rate shock, and that SMED would be entitled to a portion of the insurance funds if it took responsibility for power supply costs, since one is dependent on the other. However, the Department has found above that SMED does not have any obligations for HL&PD's power purchase contracts and costs. Therefore, the Department finds that SMED has no claim to insurance escrow monies associated with such obligations and costs.

III. VALUATION OF PROPERTY

In this section the Department's goal is to calculate the fair value of the physical property to be included in the sale to Stow. In determining the fair value of the property, the Department will consider the statutory language and intent, public policy, Department and appellate precedent, and accounting principles. The parties have advocated two distinct valuation methods, generating vastly different figures for the value of the property located in Stow. The Department also considers the type of depreciation methods applied to the gross cost, the appropriate allocation, if any, of the reserve and contingency fund, and the current depreciation of the HL&PD distribution plant to determine the value of the property.

A. Valuation Methods

1. Description

SMED and HL&PD have submitted two methods of valuation for the HL&PD property located in Stow, original cost less depreciation ("OCLD") and reproduction cost

new less depreciation ("RCNLD"). SMED advocates the use of OCLD based on the net book value of the property. HL&PD advocates the use of RCNLD, but also presented an alternative method of OCLD which is based on a current inventory of the property priced back to the date of installation. Each party calculated a value of the property based on its preferred valuation method. SMED calculated the value of the property in Stow based on OCLD at $240,050 (Exh. SMED-3, at 12). HL&PD calculated RCNLD at $4,896,030, and the alternative OCLD at $2,124,059 (Exh. HL&PD-2, exhs. RGT-1, RGT-2).

2. Positions of the Parties[29]

a. SMED

SMED defined OCLD as the net book value of the plant minus depreciation (see Section III.B. for a discussion of depreciation) (Exh. SMED-3, at 2). SMED indicated that HL&PD did not maintain records or calculate net book values of plant by location (id. at 3, 4). Therefore, in order to calculate OCLD for the HL&PD property located in Stow, SMED used the 1994 HL&PD Annual Return to the Department of Public Utilities ("1994 Return") to establish the original book value, the depreciation rate by Department account ("DPU account"), and the December 31, 1994 value of HL&PD's entire distribution plant (id.; see Exh. SMED-1).[30]

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[29] Neither MECo nor MMWEC addressed the issue of valuation methods in its briefs or in hearings.

[30] The data utilized by SMED from the 1994 Return is found in the section entitled "Utility Plant - Electric," accounts 364 through 373 (Exh. SMED-1, at 17).

SMED then developed an estimate of the OCLD for the plant in Stow as of December 31, 1995 (Exhs. SMED-1; SMED-3, at 4). In order to estimate the cost of the property in December 1995, SMED determined the ratio of plant additions to book value, by account, averaged over the years 1992, 1993, and 1994 (Exh. SMED-3, at 4). SMED used the nominal average, taking a percentage of the beginning year balance in the years 1992 through 1994 (Exh. DPU-2). SMED projected that plant additions, as well as retirements and adjustments, from December 1994 to December 1995, would accrue at the same rate as over the three preceding years (Exh. SMED-3, at 4).

SMED applied an allocator to the adjusted book value, based on SMED non-coincident peak as a percentage of HL&PD total system non-coincident peak, to determine the value of the portion of the HL&PD distribution plant to be purchased by SMED (id. at 4, 5, workpaper 2a). SMED indicated that the relationship of non-coincident peak to distribution plant is that the distribution plant has to be sized to carry the entire load in the system, and that the non-coincident peak would generate a slightly larger allocator than coincident peak (Tr. 4, at 26). SMED's mathematical calculation based on load determined that the allocator for Stow's portion of the load is 13.7 percent (Exh. SMED-3, exhibit 4).[31]

With reference to the RCNLD method of valuation, SMED notes that HL&PD did not pay reproduction cost for its plant, but rather the original booked cost, and that cost-of-

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[31] SMED stated that, as an alternative to using the allocator method in determining the allocation of poles, the most relevant factor would be the miles of wire that the poles are carrying (Tr. 4, at 27). SMED indicated that, while Stow is larger than Hudson in geographic area, Hudson has many more miles of streets (id.). SMED estimated the miles of wire in Stow to be approximately 52-54 miles, and the miles of wires on the HL&PD system to be approximately 181 (id. at 28).

service rate regulation has always valued plant for ratemaking purposes at the net book value (Exhs. SMED-3, at 3; SMED-4, at 12). SMED indicates that "the cost of the property less a reasonable allowance for depreciation and obsolescence ..." has been repeatedly interpreted by the SJC in similar cases to mean OCLD, the "rate base" measure of damages (SMED Initial Post-Hearing Brief at 64).[32] Further, SMED contends that two relevant cases concerning the Appellate Tax Board's ("ATB") review of local property tax assessments, which use the "fair cash value" as the basis for valuation, do not refer to RCNLD for utility distribution plant (SMED Initial Post-Hearing Brief at 65-66, citing Boston Edison Company v. Board of Assessors of Watertown, 387 Mass. 298 (1982) Boston Edison Company v. Board of Assessors of Watertown, 393 Mass. 511 (1984)).

SMED asserts that valuing a property for purchase is the same as valuing it for ratemaking purposes (Tr. 4, at 77). SMED argues that because utility rates in Massachusetts are based upon the book value of the plant, any amount that a purchaser paid over rate base would not earn a return (id.). Therefore, SMED contends, a purchaser would not want to pay more for the plant than it could put into its rate base (id.).

SMED also asserts that the plant has already been paid for by the ratepayers of HL&PD, including ratepayers in Stow, and that any upward adjustment to the net book value of the system would result in ratepayers' paying for the same plant more than once

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[32] SMED cited the following SJC decisions as endorsing OCLD: Southbridge v. Southbridge Water Supply Company, 371 Mass. 209, 215-217 (1976); Oxford v. Oxford Water Company, 391 Mass. 581, 586-591 (1984); Edgartown v. Edgartown Water Company, 415 Mass. 32, 34-35 (1993); Southbridge v. Southbridge Water Supply Company, 411 Mass. 675, 676-677 (1992); Falmouth v. Falmouth Water Company, 180 Mass. 325, 330-333 (1902).

(Exh. SMED-4, at 14-15). SMED maintains that because labor costs were expensed on HL&PD's books and expensed and collected in rates, HL&PD's proposed RCNLD valuation method would result in the people of Stow paying twice for HL&PD plant costs (SMED Reply Brief at 7).

SMED further argues that HL&PD's analysis to determine its alternative OCLD valuation of property located in Stow is incorrect and cites three errors: (1) the analysis did not refer to the book value of HL&PD's plant; (2) the analysis double-counted labor expenses and other installation costs; and (3) the analysis ignored the accumulated booked depreciation and developed a composite figure that produced an inflated original cost ("OC")/OCLD ratio (SMED Initial Post-Hearing Brief at 70-71). To illustrate its point, SMED calculated that HL&PD's estimates for OC and OCLD of the HL&PD utility plant in Stow are 3.3 and 8.5 times greater, respectively, than one would expect them to be based on HL&PD's 1994 Return (id. at 70).

SMED asserts that the HL&PD system is technically obsolescent, in that many items, while not aged, would not be used now in constructing a new system (Tr. 5, at 169). SMED indicates that the properties in Stow appear to be in worse condition than the properties in Hudson (id. at 138). However, SMED did acknowledge that the plant in Stow appeared to be in good condition, and that the reliability of the plant, including that for Stow, was good (id. at 58, 70, 139).

In addition, SMED asserts that the Department, in properly calculating OCLD, must adjust HL&PD's books downward to reflect the fact that HL&PD over-depreciated nuclear

plant and under-depreciated distribution plant (see Section III.B.3, below) (SMED Pre-Hearing Brief at 55).

Finally, SMED contends that if the Department were to accept HL&PD's RCNLD method to value the plant, other municipal electric systems may divest themselves of property and the authority to sell electricity in specific service areas as a fundraising mechanism to utilize the extra funds for their own benefit (Exh. SMED-4, at 15).

b. HL&PD

HL&PD argues that according to Section 43, SMED should pay HL&PD the fair value of the properties, and defines fair value as "the price to which a willing buyer and willing seller would agree, neither being under the compulsion to act, with full knowledge of all relevant facts and acting at arm's length" (Exh. HL&PD-1, at 5). HL&PD notes that the statute expressly says "fair value" rather than "actual cost," and argues that SMED disregards the concept of fair value in interpreting the statute (HL&PD Initial Post-Hearing Brief at 15-16). HL&PD asserts that private property shall not be taken without just compensation, as provided by the United States and Massachusetts Constitutions (id. at 15). HL&PD therefore argues that just compensation requires that the property owner be awarded the fair market value of the property (id.).

HL&PD asserts that RCNLD is a more appropriate indicator of value than OCLD because it considers the current cost to install the properties and then reduces this cost based upon a realistic consideration of the condition of the properties (Exh. HL&PD-1, at 18). HL&PD argues that OCLD does not reflect the value that is being taken and that SMED is receiving, and does not take into consideration the value of ongoing improvements and

emergency repairs to the distribution system (HL&PD Initial Post-Hearing Brief at 19). HL&PD maintains that the OCLD method is more appropriate to use in setting rates and determining allowed rates of return because OCLD provides the historic value of the investment as it is found in the rate base of a utility (Exhs. HL&PD-6, at 4; HL&PD-5, at 13). HL&PD contends that the SJC has endorsed the use of RCNLD to determine the value of special purpose property, including utilities (HL&PD Initial-Post Hearing Brief at 17).[33]

HL&PD defined RCNLD as the fair market value of an asset, calculated as the estimate of the replacement value of a particular asset, adjusted for depreciation (Exh. HL&PD-5, at 14). HL&PD stated that since HL&PD did not maintain property records by town, it calculated RCNLD utilizing a method to identify and cost all the distribution property in Stow (Exh. HL&PD-1, at 9). HL&PD began by itemizing the properties by type and quantity and costing individual properties based on estimates of the installed cost (id. at 8). HL&PD then indexed the cost of the properties to April 1995, and depreciated the properties using a composite depreciation figure (see Section III.B.1. for discussions on depreciation) (Exh. HL&PD-2, exhs. RGT-1, RGT-2).

In order to prepare a list of the distribution properties, HL&PD used information that it maintained regarding the electrical circuits and combined it with a field survey to establish

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[33] HL&PD cited the following decisions as endorsing RCNLD: Gloucester Water Supply Company v. Gloucester, 179 Mass. 365, n.6 (1901); Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 147 (1967); Oxford v. Oxford Water Company, 391 Mass. 581, 589 (1984); Boston Edison Co. v. Board of Assessors, 387 Mass. 298, 304 (1982); Massachusetts-American Water Company v. Grafton, 36 Mass. App. Ct. 944, 945 (1994).

the current condition of the properties (Exh. HL&PD-1, at 9). Current material prices for the various property items were generated by the HL&PD engineering department based on information gathered from local suppliers, as well as extrapolation of known costs, such as the costs of certain classes of poles and wires (id. at 9, 10; Exh. SMED-13). Labor required to install the various property items was based on an estimate of the current installation time requirements of the HL&PD line crews (Exh. HL&PD-1, at 10). For purposes of capturing inflation, the final costs were then indexed to April 1, 1995 using the Handy-Whitman Index ("H-W Index"),[34] for the period to January 1995 and an extrapolation of the H-W Index for the period January 1995 through April 1, 1995 (id.).

In addition to calculating RCNLD, HL&PD also developed its own OCLD calculation of the value of the property in Stow, similar to the calculation of property based on RCNLD (Exh. HL&PD-2, exhs. RTG-1, RTG-2). HL&PD calculated OCLD by deflating the replacement cost of the properties back to their average installation ages using the H-W Index, and then applying the same depreciation factor HL&PD used for RCNLD (Exh. HL&PD-1).

In support of its valuation method, HL&PD asserts that neither SMED nor its customers have any property rights to the facilities, and that ownership rests with Hudson (Exh. HL&PD-6, at 4; Tr. 2, at 100-101). HL&PD notes that all customers in Stow are

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[34] The H-W Index is a table that lists, for each account number or set of plant items, the inflation adjustments from the year 1912 to January 1995 (Exh. HL&PD-1, at 10, 16).

being offered the right to continued use of the facilities based on their depreciated costs if they choose to remain as part of the HL&PD system (Exh. HL&PD-6, at 4).

HL&PD also argues that SMED's proposed method does not follow standard appraisal principles and procedures in that SMED's method only calculates a cost and confuses it with value (Exh. HL&PD-3, at 2). HL&PD states that SMED's analysis of OCLD is based on five errors: (1) a valuation of the assets from the buyer's standpoint only; (2) an assumption that a utility would only be willing to pay OCLD when acquiring utility property; (3) an assumption that value can be calculated by subtracting depreciation from original cost as booked; (4) an assumption that the total cost of plant booked represents the total cost expended by HL&PD to construct its properties; and (5) an assumption that HL&PD's property in both Stow and Hudson consists of the same proportion of inventory, or mix of properties, with assets the same ages in Stow as in Hudson, and that the assets in Stow are in the same condition as those in Hudson and directly proportional to peak demand (HL&PD Initial Post-Hearing Brief at 30-34).

HL&PD argues that the Department has stated that it would allow recovery of an acquisition premium over the amount paid of book value, in appropriate circumstances, if a utility could show that the projected savings exceeded the amount of the acquisition premium sought to be recovered (id. at 31, citing Mergers and Acquisitions, D.P.U. 93-167-A (1994)). HL&PD asserts that SMED's witness testified that she expects SMED to save significant sums of money over the next 10 to 20 years; therefore HL&PD asserts that, even if Stow were an investor-owned utility and subject to the Department's rate regulations, it could receive Department approval to recover the premium (id.).

HL&PD argues that it would only be appropriate to use an allocation factor, as proposed by SMED, if the plant in Stow represented a very similar mix to that of the total properties, if all plant were installed at the same time, and if all plant were in a similar condition (Exh. HL&PD-3, at 5). Further, HL&PD argues that it is only appropriate to use an allocator based on a percentage of peak demand if it could be proven that the percentage of peak demand in Stow was equal to the percentage of property in the area (id. at 6). Finally, HL&PD emphasizes that booked cost is grossly understated, because HL&PD's accounting procedures did not include all labor costs (id. at 4).

3. Analysis and Findings

Section 43 requires the Department to determine the purchase price of a municipal utility's property:

> having in view the cost of the property less a reasonable allowance for depreciation and obsolescence, and any other element which may enter into a determination of a fair value of the property so purchased, but such value shall be estimated without enhancement on account of future earning capacity or goodwill, or of exclusive privileges derived from rights in the public ways ....

G.L. c. 164, § 43.

Section 43 does not set forth a particular formula or method by which fair value ought to be calculated. There is no clear Department or appellate decision which interprets Section 43.[35] Therefore, in construing this statute, the Department has taken into

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[35] The Department's Order in the only previous proceeding involving this statute, Chester Electric Light Company, D.P.U. 2917 (1928), is summary in nature and provides no guidance as to how the appropriate purchase price was determined by the Department.

consideration the purpose of the statute, the statutory language, analogies in Department precedent, and other related appellate decisions.

First, the Department is guided by the underlying purpose of the statute: to facilitate town purchase of utility plants at fair value. Clearly, Stow has the authority to establish its own municipal plant. St. 1898, c. 143. The Department views Section 43 as an expression of legislative intent that before Stow takes such action, it must offer to purchase certain HL&PD property at fair value.

The statutory language also provides the Department with guidance. The statute directs the Department to consider "the cost of the property less a reasonable allowance for depreciation and obsolescence." G.L. c. 164, § 43. The Department interprets this directive as one to consider the original cost of the property less depreciation, or OCLD. See Eastern Edison Company, D.P.U. 1580, at 13 (1984) (Department policy to consider cost for ratemaking purposes as original cost). However, OCLD is not the only element to consider when valuing this property since the statute also expressly directs the Department to consider "any other element which may enter into a determination of fair value." G.L. c. 164, § 43.

Fair value is defined as the highest price a willing buyer would pay a willing seller for the property. Boston Edison Company v. Board of Assessors of Watertown, 387 Mass. 298, 305 (1982). The Legislature authorizes the Department to weigh a set of factors in determining fair value, but does not specify what factors the Department ought to consider. Some items are expressly excluded from the set of factors to be considered. These are future earning capacity, goodwill, and exclusive privileges derived from the rights in public ways. Any factors to be considered must be firmly grounded in the record and in

public policy. The Department has considered how utility property has been valued in other contexts such as ratemaking, mergers and acquisitions, eminent domain, and tax assessments,[36] in determining whether there are factors other than OCLD to take into account in determining fair value.

The Department notes that the definition of value for utility plant varies according to the context in which it is considered. Utility plant is valued differently for ratemaking purposes, mergers and acquisitions, eminent domain, and tax assessments. The analysis below addresses the concept of valuation in each of these contexts and how they apply specifically to this situation, in order to determine a method that reflects the fair value of this property. We begin with the valuation of property in ratemaking.

For ratemaking purposes, the Department has long maintained a policy of valuing utility plant at original cost rate base. Eastern Edison Company, D.P.U. 1580, at 13 (1984); Worcester Electric Light Company, D.P.U. 2694/2609 (1927). A utility's ratesetting process is intended to provide its shareholders with a reasonable opportunity to earn a fair return on their investment. Eastern Edison Company, D.P.U. 1580. The use of current or reproduction prices to measure plant valuation has little bearing on the actual investment made in these properties by HL&PD. The Department therefore has historically rejected the use of rate base calculations based on measures such as reproduction cost or RCNLD because

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[36] SMED cites a number of cases involving the sale of water companies where the SJC has valued the property at original cost. However, the statutes involved in those cases, St. 1880, c. 73, § 7, St. 1898, c. 66, § 12, and St. 1904, c. 193, require value to be based on "actual cost," and not fair value. The Department does not find these cases instructive as to what other elements should be considered in determining fair value.

of their susceptibility to market conditions, which have no bearing on the amount of plant investment made by shareholders, which is the issue in ratemaking. Cambridge Electric Light Company, D.P.U. 9781 (1952); Worcester Electric Light Company, D.P.U. 2694/2609 (1927).[37]

The amount of HL&PD's investment in its plant is an element of fair value in this case. For this reason, we find that it is appropriate to use OCLD as part of the determination of fair value here. However, in calculating fair value for the purchase in this case, prior investment or OCLD alone is not determinative. In addition to ratemaking principles, other factors warrant consideration and indicate that RCNLD may be an element of fair value in this instance.

Our mergers and acquisitions precedent with regard to municipal acquisitions has focused on mergers and acquisitions of municipal electric systems by larger investor-owned utilities or their subsidiaries. The majority of these cases, especially in the last 30 years, involved electric and gas companies that were each providing a similar service as a subsidiary of a parent company. Massachusetts Electric Company/Manchester Electric Company, D.P.U. 1457 (1983); New Bedford Gas and Edison Light

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[37] With respect to Hudson's alternative, while trended OCLD does attempt to trace back plant investment to its average installation dates, the use of replacement costs as the starting point of the trended OCLD analysis makes this approach subject to the same problems as encountered in the RCNLD approach. Further, while the Department has occasionally relied on trended OCLD to determine rate bases for small water utilities, this was not a matter of policy, but an expedient to determine the level of capital prudently invested for those utilities whose record keeping systems were so inadequate, i.e; had significant deviations from Generally Accepted Accounting Principles, as to otherwise preclude the determination of rate base. See, e.g., C&A Construction Company, D.P.U. 10907 (1954).

Company/Commonwealth Gas Company, D.P.U. 302 (1980); New England Power Company/Massachusetts Electric Company, D.P.U. 14833 (1965); Plymouth County Electric Company/New Bedford Gas & Electric Light Company, D.P.U. 15084 (1965). We have historically used only original cost (book value) to determine the sale price of municipal distribution systems for both mergers and acquisitions. Blandford Municipal Light Department/Western Massachusetts Electric Company, D.P.U. 8704 (1949); Granville Municipal Electric Light/Lee Electric Company, D.P.U. 4019 (1930); Southwick Municipal Light/Lee Electric Company, D.P.U. 4211 (1931). Similarly, the Department's long-standing practice has been to rely on original book value as the basis for valuation in acquisitions. Boston Gas Company, D.P.U. 17138, at 7 (1971). See also Lee Electric Company, D.P.U. 4211; Lee Electric Company, D.P.U. 4019.

However, the Department policy in regard to mergers and acquisitions and the valuation of the related properties has recently changed. See Mergers and Acquisitions, D.P.U. 93-167-A (1994). Under D.P.U. 93-167-A, a price higher than original cost, categorized as an acquisition premium,[38] would be reviewed on a case by case basis, and could be allowed as part of a general balancing of costs and benefits. D.P.U. 93-167-A at 7. Therefore, under this policy, it is possible that utility plant could be acquired for more than its book cost.

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[38] An acquisition premium is generally defined as representing the difference between the purchase price paid by a utility to acquire plant that had previously been placed into service and the net depreciated cost of the acquired plant to the previous owner. D.P.U. 93-167-A at 9 (1994). The acquisition premium would likely be booked to Account 303 -- intangible plant, and amortized over the life of the acquired assets. D.P.U. 93-167-A at 12.

With respect to the eminent domain context, the parties have stated that a sale such as this is analogous to a condemnation or eminent domain case. When the property to be taken by eminent domain is "special property," that is, it is not of a type frequently bought or sold and is used for a special or unusual purpose, the accepted way to determine fair value is RCNLD. Commonwealth v. Massachusetts Turnpike Authority, 352 Mass. 143, 147 (1967). Public utility property has been considered special purpose property. Boston Edison Company v. Board of Assessors of Watertown, 387 Mass. 298, 301 (1982).

In utility tax assessment cases, the ATB is asked to make a determination similar to ours in this case -- to determine the fair market value of property. To do this, the ATB defines its goal as establishing what a willing buyer would pay a willing seller. In Boston Edison Company v. Board of Assessors of Boston, 402 Mass. 1, 13-14 (1988), the SJC held that there may be factors which would explain why a buyer would be willing to pay greater than book cost for certain utility property.[39] The factors considered by the SJC include comparable sales, net capitalized earnings, rate base measure, RCNLD, the advantages of purchase over construction, the presence of a potential non-regulated buyer, government restrictions over financial returns, and the possibility of change in the regulatory framework. Id.

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[39] In Boston Edison Company v. Board of Assessors of Watertown, 387 Mass. 298 (1982), the SJC upheld the ATB's assessment of the fair cash value of utility distribution property based on 95 percent replacement cost and 5 percent original cost In Boston Edison Company v. Board of Assessors of Watertown, 393 Mass. 502 (1984), the SJC upheld the ATB's assessment of the same property based on 97 percent original cost and 3 percent replacement cost. In Boston Edison Company v. Board of Assessors of Boston, 402 Mass. 1 (1988), the generation property at issue was assessed based on 50 percent original cost and 50 percent replacement cost.

While factors such as comparable sales and net capitalized earnings are irrelevant here because of the special nature of the property and the specific statutory exclusion of future earning capacity from the determination of value, the Department, based on the following analysis, concludes that in order to determine a fair value for this property, the calculation should take into account factors that reflect both OCLD, and the value that is being taken and that SMED is receiving, which is best represented by RCNLD.

The Department notes that OCLD reflects the statutory directive to consider the cost of the property less depreciation as well as HL&PD's investment in the property. However, the use of OCLD alone does not capture the fair value of this property. OCLD does not take into account the full value of improvements and repairs to the system. SMED would be receiving and utilizing a distribution system that is in good condition and reliable. SMED could not build a new system for a price close to the cost presented as OCLD, and while some parts of the system may be technically obsolescent, they are not functionally obsolescent. In addition, SMED has indicated that it would be receiving significant economic benefits from its severance with HL&PD.

Finally, the Department notes that the SJC also considers the potential for changes to the regulatory framework as a factor in determining the value of a property. First, the Department in D.P.U. 93-167-A altered its previous policy of denying acquisition premiums, thereby creating the potential for recovery of an acquisition premium for utilities. Although G.L. c. 164, § 58 limits the rate of return for municipal utilities, a utility could book an acquisition premium to Account 303 – intangible plant, and amortize it over the life of the acquired assets, and still remain in compliance with G.L. c. 164, § 58. More important, the

Department has issued principles for the restructuring of the electric industry in Massachusetts. See D.P.U. 95-30. In D.P.U. 95-30, the Department stated that increasing competition in the electric industry and allowing market forces to operate wherever possible, are the most effective means of increasing efficiency and lowering the costs of providing electric services. Id. at 13. The Department notes that it is impossible to predict the specifics of the restructuring of the Massachusetts electric industry. Therefore, it is difficult to gauge the effect of restructuring on these two municipal light departments, HL&PD and SMED, and the subsequent market value of the property in question, highlighting the issue of potential regulatory change noted by the SJC.

In addition to the factors above, the Department has also considered the use of an allocation factor which is required under the SMED OCLD method, but not under the HL&PD RCNLD method. The Department has serious concerns about the allocation method used by SMED to determine the allocation of plant to SMED under OCLD. Because HL&PD did not maintain records on the value of the plant by location, SMED used an allocator based on Stow's percentage of peak load to determine the percentage of the book value of the HL&PD plant to be booked to SMED. This method does not take into account the sizes of Stow and Hudson, including miles of streets, condition of plant, and age of plant. The record indicates that Stow has at least 29 percent of the total HL&PD system wire, which is more than the generic allocator of 13.7 percent used by Stow. The Department, therefore, has concerns that other plant items might be similarly misallocated under SMED's OCLD calculation, presenting an inaccurate picture of the actual size of the plant located in Stow for purposes of valuation.

In summary, to determine the purchase price, the statute requires the Department to take into consideration the cost of the property less depreciation, and any other element that goes to fair value, while disregarding future earning capacity, goodwill or exclusive privileges derived from rights in the public way. Our goal in this valuation is to facilitate the transfer of the property at fair value. A valuation of this type cannot be done with mathematical precision, since it involves a balancing of qualitative factors and the exercise of judgment as to what constitutes fair value. See Boston Edison Company v. Board of Assessors of Boston, 402 Mass. 1, 16 (1988).

Based on its analysis, the Department concludes that a combination of OCLD and RCNLD is the most appropriate method to apply in determining the fair value of the property. We interpret the language of the statute as a directive to consider the original cost of the property less depreciation or OCLD, and we accord this substantial weight. Moreover, our ratemaking principles make it appropriate to use OCLD as part of the valuation, since OCLD reflects the utility's investment in the property. However, in order to fully reflect the fair value of the property, we must also take into account RCNLD, which reflects the value that is being taken and that SMED is receiving, i.e., the value of a reliable system in good condition. Further, RCNLD takes into account regulatory changes, such as electric restructuring, and negates the need for the use of an inaccurate allocation method to calculate the value of the plant in Stow.

Accordingly, the Department finds in this case that a valuation of the property based on a split of 50 percent of SMED's calculation of OCLD and 50 percent of HL&PD's calculation of RCNLD is just and reasonable and reflects the fair value of the property.[40]

B. Other Miscellaneous Elements

1. Depreciation Method

a. Introduction

In addition to setting a valuation method, the Department must determine an appropriate depreciation method. SMED's proposed straight-line depreciation method is tied to the book value of the plant in Stow, as listed in the 1994 Annual Report, and therefore no alternative depreciation method was presented by SMED. HL&PD presented a composite depreciation method, entitled Overall Condition Factor, that included three components -- straight-line, life extension and observed condition (Exh. HL&PD-1, at 11).

b. Positions of the Parties

(1) SMED

SMED's proposed valuation calculation utilized a straight-line depreciation factor, also referred to as the accounting method, in order to account for the age of the property in question (Exh. SMED-3, at 4). SMED calculated the straight-line depreciation for the plant in Stow by utilizing the 1994 Return, in which HL&PD recorded its depreciation expense

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[40] This valuation method does not foreclose further adjustments by the Department relative to the type of depreciation methods applied to the gross cost, the appropriate allocation, if any, of the reserve and contingency fund, and the current depreciation of the HL&PD distribution plant (see Section III.B.).

and remaining undepreciated plant balance by FERC account number in the section entitled Utility Plant - Electric (Exhs. SMED-1; SMED-4, at 12).

SMED contends that HL&PD's depreciation calculation, based on a composite depreciation factor, resulted in a smaller reduction to plant value than is warranted (Exh. SMED-4, at 12). SMED argues that the amount of depreciation calculated using the composite depreciation factor method is so small that HL&PD's proposed value for the properties in Stow is close to the cost of a new distribution system (id.). SMED asserts that HL&PD inflated its OC/OCLD and RC/RCNLD ratios by understating actual, booked depreciation percentages, which would result in double collection of previously collected depreciation expense (SMED Reply Brief at 7).

SMED argues that HL&PD's composite depreciation method does not produce a realistic estimate of the condition of the distribution plant (Exh. SMED-4, at 13). Further, SMED points out that HL&PD ignored HL&PD's booked depreciation rates and booked depreciation accumulations, and instead applied life extension estimates and condition percent estimates (SMED Initial Post-Hearing Brief at 71). SMED asserts that the observed condition percent weightings are devoid of credibility because they are entirely judgmental, cannot be reproduced or renewed, and are based on HL&PD's view that the system is in very good condition, with no obsolescence (id.). SMED's witness stated that the system as a whole is not in very good condition, but conceded that it could be categorized as in good condition (Exh. SMED-5, at 11; Tr. 5, at 173). According to SMED, some of HL&PD's property is technologically obsolete (Tr. 5, at 168-169). SMED asserts that contrary to

HL&PD's position, the life of electric poles, distribution poles, and line transformers cannot be extended through the course of normal maintenance (Exh. SMED-5, at 9-11).

(2) HL&PD

HL&PD asserts that a depreciation calculation should consider the age of the properties, the maintenance of the properties, and the actual condition in the field (Tr. 1, at 22, 23). HL&PD asserts that the composite depreciation factor was developed to reflect the overall reduction in value that has occurred to the property in Stowdue to physical deterioration, functional obsolescence and external obsolescence since the time the property was originally installed (Exh. HL&PD-1, at 11).

To arrive at the Overall Condition Factor, HL&PD assigned each component a weight: (1) a weight of one, or 25 percent for straight-line; (2) a weight of one, or 25 percent for life-extension; and (3) a weight of two, or 50 percent for observed condition (id. at 16). HL&PD's witness indicated that he has been using this composite depreciation factor for a number of years; however, he was not aware of the application of this method by others in his field (Tr. 2, at 6).

HL&PD developed the straight-line factor by estimating the average useful service life and the average age of the properties by DPU account number, then divided the estimated average age by the estimated useful service life (Exh. HL&PD-1, at 12). HL&PD calculated the estimated service lives based on "A Survey of Depreciation Statistics,"[41] which

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[41] The Survey of Depreciation Statistics was prepared by the American Gas Association Committee and the Edison Electrical Institute Depreciation Accounting Committee in 1989-1990 (Exh. HL&PD-1, at 12). The Survey is a listing of the average service

(continued...)

calculates the average service life for each DPU and FERC account based on the experience of all electric utilities in the Northeastern United States (id.). HL&PD stated that it used its own data on the installation dates for transformers, poles and meters to estimate the average age of the properties when such data were available (id. at 13). HL&PD then calculated the average age of the transformers, based on the actual installed date of all Stow transformers, and used this average age for all other property items with the exception of poles and overhead lines, whose lives were based on a sampling of the installed dates for 468 poles (id.).

However, HL&PD asserts that straight-line depreciation alone is not an appropriate measure of depreciation for purposes of appraising property (Exhs. HL&PD-1, at 17; HL&PD-3, at 4). According to HL&PD, straight-line depreciation is only appropriate to use when recovering a fixed amount of cost over a given period (Exh. HL&PD-1, at 17). HL&PD argues that straight-line depreciation has no relationship to the condition of the identified properties, and that it does not reflect the annual replacement and maintenance costs of the properties under the ongoing renewal program (id. at 4). HL&PD contends that for the above reasons, straight-line depreciation was given minimal weighting in the calculation of total depreciation (id. at 12).

The life extension factor was developed by extending the service lives of properties to 150 percent of the properties' originally estimated service lives (id. at 14). HL&PD stated

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[41](...continued)
life used by individual utilities to calculate depreciation for each DPU and FERC account (id.).

that this figure is based on the effectiveness of utility amual maintenance programs, and that the calculation is supported by industry mortality curves for distribution equipment (id.). According to HL&PD, the category of life extension takes into account how a utility's maintenance practices affect the extension of the service life of the property (Tr. 1, at 24).

The observed condition factor is based upon HL&PD's witness' observations in Stow and discussions with HL&PD's management and staff (Exh. HL&PD-1, at 15). HL&PD stated that the observed condition factors were based on reviews of its maintenance practices, the type of property being valued, environmental conditions of the properties, location of the properties, and observation of the properties (Exh. DPU-32). HL&PD categorized the condition of the properties as "very good" and assigned numerical values of 80 percent or 75 percent to be used to calculate the amount of depreciation on each property by DPU account (Exhs. DPU-32; HL&PD-2, exh. RTG-1; Tr. 1, at 66, 172).

HL&PD considered the observed condition factor the most representative of the actual condition of the properties, and therefore it was given the greatest weight in the calculation of total depreciation (Exh. HL&PD-1, at 15). Although HL&PD considered observed condition the most important component, it contended that it had been conservative in its analysis by incorporating straight-line depreciation and life extension factors (Tr. 2, at 5-6).

c. Analysis and Findings

In determining the appropriate depreciation method for municipal utilities, the Department has reviewed the relationship between depreciation rates and service lives. Reading Municipal Light Plant, D.P.U. 85-121/85-138/86-28-F at 12-13 (1987). General Laws c. 164, § 57 provides that municipal electric departments may accrue depreciation at a

rate "equal to three percent of the cost of the plant exclusive of land and any water power appurtenant thereto, or such smaller or larger amount as the [D]epartment may approve." The Department has previously found that the three percent depreciation rate allowed by statute is not directly related to the life of the assets of municipal electric departments, but was intended to be used by municipal electric departments as a mechanism to raise necessary capital. Id. at 12-13; Pryballa v. Wellesley, D.P.U. 19535, at 2-3 (1979). Therefore, the depreciation rate, and resulting depreciation reserve booked by municipal electric departments, is not necessarily related to the service life of the utility plant.

The Department has found that depreciation analyses can rely not only on statistical analysis but also on the judgment and expertise of the preparer. However, the Department has held that, where a witness reaches a conclusion about a depreciation study that is at variance with that witness' engineering and statistical analysis, the Department will not accept such a conclusion absent sufficient justification in the record for such a departure NYNEX, D.P.U. 94-50, at 351 (1995); Cambridge Electric Light Company, D.P.U. 92-250, at 64 (1993); Commonwealth Electric Company, D.P.U. 88-135/151, at 37 (1989). In order to support a proposed variance from the results of statistical analysis, engineering judgment is required and demands physical inspection of the utility's plant, as well as discussions with management and other utility personnel regarding depreciation and maintenance practices. Berkshire Gas Company, D.P.U. 905, at 13-15 (1982).

The Department has previously accepted, in the case of small utilities, the use of statistical analyses prepared by industry associations as a reasonable estimate of plant service lives. Milford Water Company, D.P.U. 84-135, at 23 (1985). In this case, HL&PD relied

on statistical analyses from both its own records and those provided through trade associations. The record further demonstrates that HL&PD took into consideration its maintenance practices and the actual physical condition of the affected property. While the Department has some concern with the element of subjectivity inherent in HL&PD's application of observed condition, the Department finds that HL&PD has conducted appropriate statistical analysis and applied appropriate engineering judgment in its determination of the effect of depreciation on its property in Stow.

In regard to the life extension component, HL&PD did not provide a clear rationale for extending the life of all plant components by a uniform rate of 50 percent. We concur with SMED that regular maintenance practices would not result in extended lives for many of the components, and note that observed condition would reflect any sort of life extension due to such practices. HL&PD has not demonstrated that its maintenance practices were such that the plant lives were extended in any significant way. Further, we conclude that, even if some property items do last longer than their anticipated useful lives, we cannot automatically assume that the entire inventory would do so. Therefore, the Department finds that the category of life extension should not be considered in determining depreciation in this case.

With respect to SMED's use of book depreciation, the Department has noted above the limitations of book depreciation alone for determining the value of municipal utility property. However, because the record contains no information regarding a revised depreciation reserve, the overall numerical difference in value that would arise from an adjustment to the booked depreciation involved would be limited. Noting the lack of

discussion concerning this particular depreciation rate by the parties, the Department shall not adjust SMED's depreciation measurement.

Accordingly, the Department finds that the appropriate method of calculating depreciation for RCNLD is a composite calculation derived from the HL&PD method, consisting of 50 percent straight line depreciation, and 50 percent observed condition.

2. The Flush

a. Description/Introduction

The Flush is a fund collected by MMWEC to be used for reserve and contingency ("R&C") purposes (Exhs. DPU-8; DPU-57). The fund was established in accordance with an MMWEC requirement whereby every month, each project participant pays an amount equal to 10 percent above its actual power costs (Exhs. DPU-8; DPU-57). The monies paid into the Flush are to be used by MMWEC to cover any unexpected or extraordinary costs associated with a project, and all unexpended funds are returned to the participants, e.g., HL&PD, as of June 30 of each fiscal year (Exhs. DPU-8; DPU-57). HL&PD stated that in addition to the monies associated with the 10 percent R&C required by MMWEC, its Flush fund also includes sellback and settlement funds (Exh. DPU-57). HL&PD reported the amount of Flush funds it received by year from 1991 through 1994, and the disposition of said funds (Exhs. DPU-98; DPU-99; DPU-100; SMED-RR-1). The Flush is funded on a year-end basis to true up the reserve and is essentially a balancing account (Tr. 2, at 187).

MMWEC participates in eight projects, one of which is Project No. 6, which represents MMWEC's largest share of Seabrook (Exh. MMWEC-1, at 3). Each of MMWEC's PSAs are take-or-pay contracts which require up to a 25 percent "step-up" for

non-defaulting participants when a project experiences a non-payment by one or more participants who default (id. at 2). HL&PD is the largest participant in Project No. 6, which experienced a default by both Vermont utilities and the Eastern Maine Electric Cooperative prior to 1989, after which HL&PD experienced a step-up from 18.8 percent to 23.1 percent of the project costs (id. at 3).

Within this context, an issue arose regarding whether SMED is entitled to any portion of the Flush funds.

b. Positions of the Parties

(1) SMED

SMED asserts that when it exits the HL&PD system, HL&PD will have control of a large amount of monies associated with past Flush overcharges (Exh. SMED-3, at 11). SMED claims that it is entitled to a portion of these overcharges (id.). According to SMED, HL&PD did not reduce its booked power costs by the additional monies associated with the 10 percent reserve, therefore it did not reduce its purchase power adjustment charge to return those funds to ratepayers (id.). SMED contends that the Flush monies were not returned to ratepayers before 1994 (Tr. 4, at 66).

Further, SMED argues that the amount of money that HL&PD contends it needs to meet its obligation to MMWEC associated with the Project No. 6 step-up, which is to be paid out of the Flush, is inflated (SMED Initial Post-Hearing Brief, at 72 n.53). In support of this argument, SMED cited the 1994 Annual Report of the Town of Hudson which documents that the Vermont Superior Court entered a judgment against MMWEC for

$3.4 million, as opposed to the $6.2 million quoted by HL&PD (id., citing Exh. DPU-61, at 22).

SMED calculated that the amount of Flush monies owed to it are approximately $572,076 (DPU-RR-24). SMED based this amount on the total Flush for 1992 and 1993, allocated by the percentage of Stow's energy sales to those of the whole system (12.9 percent) in those years (id.; Tr. 4, at 65).

(2) HL&PD

HL&PD asserts that all Flush funds received through 1994 have been fully returned to its customers (Exh. HL&PD-6, at 6; Tr. 2, at 149-150). HL&PD asserts that the Flush is not dedicated to any particular group of HL&PD customers, but to all of its ratepayers (Exh. DPU-57). HL&PD indicated that not all of the Flush funds were used to reduce purchased power costs (DPU-RR-18). HL&PD explained that the Flush is not returned solely through purchased power cost adjustments, but is also returned by setting rates lower to take the Flush into account (id.). HL&PD reported that, as of the end of 1994, the total undistributed R&C portion of the Flush funds was $608,620 (SMED-RR-1).[42] HL&PD asserts that only the portion of the Flush funds consisting of other monies received from MMWEC -- the sellback and settlement costs, not the R&C funds -- could be passed on to

[42] HL&PD reported that in 1992 and 1993 it received a return of the R&C portion of the Flush funds totalling $1,828,909, and $1,799,542, respectively (SMED-RR-1). Further, in 1994 it received a return of R&C funds of $1,644,352, of which the full amount was applied to reduce 1994 purchased power costs (id.). In addition, prior unapplied R&C funds were used to reduce 1994 purchased power costs and to meet the first two payments of the Vermont/Project No. 6 litigation (id.).

SMED, and only if SMED takes a slice of the system (see Section II.D. for a discussion of insurance escrow entitlement) (id.).

HL&PD stated that a portion of the funds were reserved in anticipation of HL&PD's obligations associated with the repayment of its step-up portion of Project No. 6 (SMED-RR-1). HL&PD explained that, as required by the actions of the Vermont Superior Court, all of the remaining participants in Project No. 6 would be allocated a portion of the $6.2 million step-up fee and that HL&PD's share would be 23.1 percent or approximately $1.4 million (id.). HL&PD asserts that SMED is in error when it claims that the full judgment for the Vermont Project No. 6 litigation only will total $3.4 million rather than $6.2 million (HL&PD Reply Brief at 28). HL&PD explained that only certain Vermont participants had received judgments totalling $3.4 million, that the remaining $2.8 million is still subject to judgments, that, in fact, the remaining participants have received judgments for $2.7 million of the remaining $2.8 million (id.).

c. Analysis and Findings

The record indicates that HL&PD considers its obligation to MMWEC concerning its share of the Project No. 6 step-up to be approximately $1.4 million, and a portion of the Flush has been reserved to meet this amount. Therefore, in order to maintain a reserve for the express reason of meeting the MMWEC obligation, the full amount of the Flush fund was not returned to the ratepayers. As of the end of 1994, undistributed R&C funds totalled $608,620, were credited to Earned Surplus as a reserve and not returned to ratepayers.

The Department notes that the R&C funds are those monies specifically paid for by the ratepayers to MMWEC and are therefore slated to be returned to the ratepayers by the

individual municipal electric system. However, specific circumstances regarding the use of the funds in the operation of a municipal electric system does not fall under the authority or oversight of the Department. See Municipal Light Commission of Peabody v. Peabody, 348 Mass. 266, 269 (1964); Commonwealth v. Oliver, 342 Mass. 82, 85 (1961), citing Whiting v. Mayor of Holyoke, 272 Mass. 116, 119-120 (1930) (the management and operation of the municipal plant rests with the municipal board under G.L. c. 164, § 55, and in the manager acting under them as their executive officer, pursuant to G.L. c. 164, § 56). The municipal electric system has discretion to determine if funds are needed as a reserve for the company. The Department notes that, until the time that SMED departs HL&PD, SMED, along with all of HL&PD's ratepayers, is subject to the rate structure put in place by HL&PD for its system. Accordingly, the Department finds that SMED is not entitled to a portion of the Flush funds after its departure.

3. Depreciation of Generating Plant

a. Introduction

The booked value of HL&PD's plant, as presented in the 1994 Return, is based on a depreciation schedule developed by HL&PD. The amount of depreciation taken is reflected in the difference between the total gross cost of the plant and the booked value, or OCLD, which deducts the allocated depreciation. SMED has challenged the OCLD figure, based on the 1994 Return, as a product of the historic inappropriate use of depreciation, where HL&PD over-depreciated certain generating facilities at the expense of its distribution facilities.

b. Positions of the Parties

(1) SMED

SMED asserts that HL&PD has been depreciating Seabrook at a higher rate than allowed, specifically, six percent in 1992 and 1993, and 3.37 percent in 1994 (Exh. SMED-3, at 10). SMED states that municipal light departments are required to depreciate their plant at a rate of three percent. G.L. c. 164 § 57. SMED argues that distribution plant has been depreciated at a lower rate than is required, in order to depreciate Seabrook at a higher rate (id.). SMED states that the under-depreciation of the distribution plant has resulted in HL&PD's plant being overvalued in terms of normal utility accounting practice (Exh. DPU-7). Further, SMED points out that, if HL&PD were to continue depreciating Seabrook at the rate of six percent, it would be fully depreciated halfway through its expected life (id.).

(2) HL&PD

HL&PD states that, according to G.L. c. 164 § 57, depreciation for municipal plants is set to an amount "equal to three percent of the cost of the plant exclusive of land and any water power appurtenant thereto, or such smaller or larger amount as the [D]epartment may approve" (Exh. HL&PD-14). HL&PD contends that a municipal can depreciate individual items more or less than three percent as long as the aggregate does not exceed the allowable three percent rate (id.). According to HL&PD, it has not over-depreciated its ownership in Seabrook, because a zero depreciation rate was applied in 1990 and 1991, and therefore, combined with the average rate in 1992-1994, the depreciation rate over the life of the plant has been 3.18 percent (Exh. HL&PD-3, at 8).

Further, HL&PD indicates that since its other generation assets have little book value left, those assets with a substantial book value, such as Seabrook, receive a greater proportion of the total annual depreciation allowed under G.L. c. 164, § 57 (Exhs. DPU-37; DPU-45). HL&PD provided information detailing that its depreciation rates for the years 1991 through 1994 were three percent system-wide, with the exception of 1991, when the overall depreciation rate was zero percent (Exh. HL&PD-3, exh. RGT-1).

c. Analysis and Findings

Under G.L. c. 164 § 57, HL&PD is required to follow a depreciation schedule in which the depreciation equals three percent of the cost of the plant, unless otherwise permitted by the Department. The statute does not set out specifics as to the exact amounts of depreciation allowed by account number in order to meet the three percent requirement. The Department finds that HL&PD's practice of applying larger or smaller percents of depreciation to different accounts is allowable as long as the depreciation for the entire plant meets the three percent guideline. Accordingly, the Department finds that HL&PD has not, on the whole, over-depreciated or under-depreciated its plant.

C. Conclusion

The Department has found that the appropriate valuation method is a split of 50 percent of SMED's calculation of OCLD and 50 percent of HL&PD's calculation of RCNLD. The Department has also made findings concerning three other miscellaneous elements that must be factored into the valuation. First, the Department has found that the appropriate method of calculating depreciation for RCNLD is a composite calculation derived from the HL&PD method, consisting of 50 percent straight-line depreciation, and 50 percent

observed condition. Second, the Department found that SMED is not entitled to a portion of the Flush funds. Finally, the Department found that HL&PD has not, on the whole, over-depreciated or under-depreciated its plant. Therefore, taking into account the specified valuation method and the other miscellaneous elements, the value of the property in Stow is $2,425,930.[43],[44]

IV. SEVERANCE DAMAGES

A. Introduction

Section 43 provides that the price of the property included in the purchase "shall include damages, if any, which the [D]epartment finds would be caused by the severance of the property proposed to be included in the purchase from the property of the owner." G.L. c. 164, § 43. The parties dispute whether such damages include consequential or economic damages in addition to physical damages. The parties agree, however, that severance damages should include costs associated with the physical termination and

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[43] In order to calculate the value of the property in Stow the Department first took 50 percent of SMED's calculation of OCLD, adjusted for the denial of SMED's claim of over-depreciation (see Section III.B.3). This figure is $127,493 (50 percent of $254,985). The Department then calculated 50 percent of HL&PD's RCNLD, as adjusted by the new depreciation methodology (see Section III.B.1). This figure is $2,298,437 (50 percent of $4,596,874). The total value is therefore, $2,425,930.

[44] The parties disagree on the appropriate valuation date. HL&PD proposed that it should be April 1995 (Exh. HL&PD-1, exhibit RGT-1). SMED argues that the date should be December 31, 1995 (SMED Initial Brief at 68). We have calculated the value as of the two dates, on the basis of the information available to us. Our valuation would be substantially accurate as of December 31, 1995. We note that issuance of this Order does not finalize the sale. Stow must vote again on the purchase, and there must be an offer and acceptance. Based on the findings in this Order, the Department has set out sufficient guidelines to facilitate a recalculation by the parties, if they so choose, of a sale price at a future date.

reconnection of HL&PD's plant located in Hudson from its plant located in Stow. SMED asserts that damages should be assessed in the amount of $15,953. HL&PD asserts that damages should be assessed in the amount of approximately $15 million.

B. Positions of the Parties

1. HL&PD

HL&PD states that Section 43 expressly requires the Department to award HL&PD damages caused by the severance of SMED from the HL&PD system if there are any damages; therefore, if the Department finds that damages will result, it must award severance damages (HL&PD Initial Post-Hearing Brief at 34). Further, HL&PD asserts that the statute does not condition severance damages upon the location of HL&PD's remaining property, or future ownership or operation of that property, and that therefore the cost associated with any property that will be damaged by SMED's departing the HL&PD system should be included in severance damages (HL&PD Reply Brief at 29).

HL&PD's claim for severance damages includes four categories of physical severance damages: (1) physical termination and reconnection costs; (2) loss of HL&PD plant outside of Stow and Hudson; (3) reduced utilization of power delivery properties; and (4) lost utilization of service equipment (Exh. HL&PD-2). HL&PD also claims economic severance damages related to increased power costs (id.). HL&PD's total claim for severance damages equals approximately $15 million.

a. Physical Damages

(1) Physical Termination and Reconnection Costs

HL&PD states that physical severance damages associated with termination and reconnection arise from the need for HL&PD to reconnect those customers in Hudson who would be isolated by severance of the lines which cross into or out of Stow (Tr. 1, at 27). HL&PD indicates that there are six HL&PD electric distribution lines that cross from Hudson into Stow (Exh. HL&PD-1, at 19). HL&PD asserts that the reconnection of the six lines would be necessary to ensure that the remaining HL&PD customers do not experience an interruption of service (id.). HL&PD states that in order to accomplish these terminations and reconnections, construction on each of the six lines at the borders of Stow and Hudson must be undertaken, which includes work on all components associated with the distribution system (Exhs. DPU-34; HL&PD-2; Tr. 5, at 141-143). HL&PD calculates that the costs of terminating the lines for Stow and reconnecting customers in Hudson would be $49,173 (Exh. HL&PD-2).[45]

(2) Loss of HL&PD Plant Outside of Stow and Hudson

With respect to physical severance damages for the loss of plant outside of Stow and Hudson, HL&PD states that it presently serves approximately 42 residential customers in the

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[45] HL&PD had originally estimated the value to be $15,953, the cost of termination only, but later determined that the costs would be $51,442 (Exh. DPU-89; HL&PD Reply Brief at 28-29). The new figure also included the costs of reconnecting customers in Hudson who are currently supplied from distribution lines in Stow (id.). HL&PD then arrived at an estimate of $50,109 and then finally at the $49,173 estimate of circuit termination and reconnection cost (Exhs. HL&PD-3, at 6; HL&PD-2).

towns of Boxboro, Harvard, Bolton, and Maynard ("Other Towns") and that these customers are served via distribution lines emanating from Stow (Exh. HL&PD-1, at 19, 20; Tr. 1, at 76-77, 135, 144). HL&PD asserts that it will be responsible for ensuring that the customers located in the Other Towns continue to receive reliable electric service (Tr. 1, at 76-77, 143). Further, the Company asserts that, in effect, these service areas will also be taken from HL&PD by SMED's leaving the system, since it would be economically infeasible for HL&PD to serve these areas (HL&PD Initial Post-Hearing Brief at 37). HL&PD defines the value that it should receive as the costs of the efforts it must undertake to secure new service arrangements for its customers in these towns, and that this value can be calculated as the value of the distribution plant properties plus the value of the customer load served (id.). HL&PD asserts that these properties have a functional use, that these properties are providing a service, and therefore that the standard of fair value that applies is RCNLD (Tr. 1, at 146). Based on the RCNLD of the properties, HL&PD calculates the severance damages for the properties in the Other Towns at $106,276 (Exh. HL&PD-2).

(3) Reduced Utilization of Power Delivery Properties

With regard to damages related to the reduced utilization of power delivery properties, HL&PD states that it utilizes certain power delivery properties in serving its customers in Hudson and Stow, which include Substation No. 1, Substation No. 2, a distribution substation, and Supply Circuits 14-6 and 14-7, all located in Hudson (Exh. HL&PD-2). HL&PD states that it installed electric equipment in its high voltage Substations No. 1 and No. 2 and constructed supply circuits between the substations and Stow to deliver power to Stow (Exh. HL&PD-1, at 20). HL&PD asserts that although the

supply circuits are located outside of Stow, they have no value to HL&PD without the SMED customers, and that a percentage of the substation properties would not have had to have been installed except to serve the electric customers in Stow (id. at 20-21). HL&PD argues that it would have recovered all of its investment in the properties through its retail rates collected over time from customers in Stow, and that SMED's departure from the system will reduce this recovery (id. at 21). Thus, HL&PD asserts that the damages due to the lost utilization of power delivery properties and service equipment represent HL&PD's unrecovered investment in equipment and property dedicated to serving SMED for which HL&PD will not be reimbursed because of SMED's departure (HL&PD Reply Brief at 41). HL&PD further asserts that SMED's witness considered lost utilization of power delivery properties as a valid component of severance (id. at 42, citing Tr. 5, at 145).

HL&PD calculated damages due to the reduced utilization of the substations by first estimating the percentage of HL&PD's peak load contributed by the customers in Stow, which is 12.6 percent (Exh. HL&PD-1, at 20-22). HL&PD then applied this percentage to the OCLD of Substations No. 1 and No. 2. For the distribution substation, HL&PD estimated the OCLD of this facility and assigned that entire amount to Stow (see Section III.A.1, for an explanation of HL&PD's methodology for calculating the value of properties based on OCLD) (id. at 22; Exh. HL&PD-2, exh. RGT-6). The calculation of the costs for the reduced utilization of Supply Circuits 14-6 and 14-7 was based on the percentages of connected transformer capacity used to serve customers in Stow from each of

these circuits, which HL&PD then applied to its OCLD figures (id.).[46] HL&PD explained that it based the value derived from lost utilization on OCLD, since a new method of supply is now being proposed, which would render the properties useless, and essentially strand the investment (Tr. 1, at 146). HL&PD calculates that the severance damages due to the unrecovered investment will be $451,525 (Exh. HL&PD-2, exh. RGT-6; Tr. 1, at 82).

(4) Lost Utilization of Service Equipment

With regard to severance damages associated with the lost utilization of service equipment, HL&PD states that it utilizes a certain portion of service equipment while serving customers in Stow, including an office building and a garage located in Hudson (Exhs. HL&PD-1, at 22; HL&PD-2). HL&PD asserts that it is entitled to damages related to lost utilization of this portion of the equipment (HL&PD Initial Post-Hearing Brief at 38). HL&PD asserts that the size of the existing office and garage would have been smaller if HL&PD had not needed to maintain the properties in Stow (Exh. DPU-51).

HL&PD utilized the same methodology to calculate the cost of these damages as that used for lost utilization of Substations No. 1 and No. 2, i.e., by first estimating the percentage of HL&PD's peak load contributed by the customers in Stow, and applying this percentage to the OCLD of service equipment (Exh. HL&PD-2). HL&PD calculates the severance damages due to the lost utilization of the service equipment to be $41,261 (id.).

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[46] Stow was allocated 80 percent of the usage of Supply Circuit 14-6 and 70 percent of Supply Circuit 14-7 (Exh. HL&PD-2, exh. RGT-6).

b. Economic Damages

HL&PD asserts its claim for economic severance damages as an alternative to requiring SMED to purchase a "slice of system," under the property analysis of the statute. See Section II, above. HL&PD asserts that it has provided service to Stow since 1898, and during those years HL&PD has met the system's electrical requirements by making a variety of investments in generation resources (Exh. HL&PD-5, at 9).[47] HL&PD further asserts that it committed long-term fixed cost assets to serve Stow, because there was a long-standing customer-supplier relationship between the parties and a clear expectation that this relationship would continue (id. at 10). HL&PD maintains that the largest portion of damages that its remaining ratepayers will incur once SMED is formed are associated with investments and contractual commitments that HL&PD entered into in order to provide long-term reliable service to Stow (HL&PD Initial Post-Hearing Brief at 38, citing Exh. HL&PD-5, at 18).

HL&PD asserts that SMED's attempt to avoid payment of any economic severance damages amounts to an attempt by SMED to capture the benefits of competition for its citizens at the expense of HL&PD ratepayers, which violates the Department's restructuring principles in D.P.U. 95-30 (HL&PD Initial Post-Hearing Brief at 45). HL&PD challenges SMED's assertion that recovery should be limited to physical damages because, according to HL&PD, such an assertion is inconsistent with the recovery of stranded costs recently

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[47] HL&PD indicated that it first became aware of SMED's interest in leaving the system through an October, 18, 1991 article in the Stow Villager (Exh. DPU-3). HL&PD stated that it was not aware of any prior time that Stow had attempted to leave the system (id.).

proposed by the Department and FERC (id. at 41). HL&PD states that the Department has determined that IOUs should have a reasonable opportunity to recover net, non-mitigable stranded costs associated with commitments previously incurred pursuant to their obligation to serve, and that such charges should not be bypassable (id. at 42, citing D.P.U. 95-30, at 29-30). Further, HL&PD asserts that FERC has recognized that it would be inequitable to allow a departing customer, such as Stow, to escape those costs which a utility has incurred reasonably on its behalf (id. at 42, citing Open Access NOPR at 33,108).

HL&PD also argues that Stow's assertion that economic severance damages should not be recoverable by HL&PD because they are "routine types of financial exposure risked by any business" fails to recognize the special duties of a public service company, specifically its obligation to serve (id. at 47). Further, HL&PD states, without elaboration, that power contracts are distinguishable from future business losses and are therefore properly included in severance damages, and that eminent domain law has recognized the validity of such consequential damages (HL&PD Reply Brief at 8, citing Kinney v. Commonwealth, 332 Mass. 568, 571-572 (1955); Kane v. Hudson, 7 Mass. App. Ct. 556, 559-561 (1979); Russell v. Canton, 361 Mass. 727, 732 (1972); Manson v. Boston, 163 Mass. 479, 480 (1895) (parentheticals omitted)).

HL&PD presented an analysis to determine the power supply costs of the HL&PD system with and without the SMED load, and calculated the net present value of the economic severance damages associated with SMED leaving the HL&PD system to be $14.9 million (Exh. HL&PD-5, at 17, 19; see Section II.D for a discussion of the Stranded Cost Analysis). HL&PD notes that, while SMED protests that this damage calculation is too

large, SMED does not contest the accuracy of the calculation (HL&PD Reply Brief at 19). Further, HL&PD explains that the large economic damage figure reflects the gap between the cost of generation on the wholesale market and the higher cost of generation reflected in retail rates (id.).

2. SMED

SMED asserts that only physical damages associated with the termination and reconnection of HL&PD's distribution plant should be assessed (SMED Initial Post-Hearing Brief at 74). However, SMED disputes the amount of such costs proposed by HL&PD (id.). SMED estimates these damages to be $15,953 (id.). SMED derived this amount from the original calculation provided by HL&PD. According to SMED, losses resulting from reduction in sales, reduced utilization of HL&PD plant in Hudson, and the RCNLD cost of HL&PD's unauthorized property in Other Towns are remote and speculative, and would not qualify under any "direct and certain" test enunciated by the Department, whether the Department stated such a test in the advisory ruling, D.P.U. 93-124-A at 12, or not (SMED Reply Brief at 4). SMED also argues, without elaboration, that these types of expenses have not been, and could not be proven to be, both used and useful (id. at 5).

SMED also disputes that any economic damages should be allowed (SMED Initial Post-Hearing Brief at 74).

a. Physical Damages

(1) Physical Termination and Reconnection Costs

SMED agrees with HL&PD's position that physical termination and reconnection costs are compensable as severance damages (SMED Initial Post-Hearing Brief at 74).

SMED indicates that HL&PD originally stated that the physical termination and reconnection work could be done for $15,953 (id., citing Exhs. HL&PD-16; HL&PD-1, at 19; HL&PD-3, at 6; HL&PD-2, at exh.4). SMED contends that HL&PD did not explain why it produced different estimates: first $51,442, second $50,109, and finally $49,173 (id. at 74). SMED maintains, without argument, that HL&PD's explanation for the latter estimates was inadequate and claims that HL&PD's original estimate of $15,953 provides a reasonable estimate for this element of damages (id.).

(2) Loss of HL&PD Plant Outside of Stow and Hudson

SMED argues that HL&PD's claim for damages related to distribution plant located in Other Towns should be denied (id. at 75). First, SMED argues that neither St. 1891, c. 370, nor Section 43 grants the Department jurisdiction to award damages relating to distribution plant in Other Towns (id.). Second, SMED contends that HL&PD has no apparent legal authority to serve these towns (id.). SMED argues that it should not be expected to pay damages for categories of losses which are both outside the scope of the controlling statute and the result of HL&PD's acting outside the law so that SMED could not have foreseen or prevented these damages (id. at 75-76). Third, SMED maintains that HL&PD has failed to mitigate these damages (id. at 76). Specifically, SMED argues that there is no evidence that HL&PD cannot sell this distribution plant to electric utilities which do have clear authority to serve the Other Towns, or else contract with SMED or other utilities to either wheel HL&PD power to the additional customers, or serve these customers directly in place of HL&PD on a contractual basis (id.). Fourth, SMED argues, without

elaboration, that the RCNLD of this tangible property outside of Stow is not related to any damages that HL&PD will suffer from Stow's departure (id.).

(3) Reduced Utilization of Power Delivery Properties and Lost Utilization of Service Equipment

According to SMED, HL&PD's claim for damages related to the reduced utilization of power delivery properties and lost utilization of power delivery properties, i.e., substations, supply circuits, and buildings in Hudson, should be denied for three reasons (id. at 76). First, SMED contends that the Department does not have authority under the controlling statutes to grant damages related to reduced utilization of HL&PD plant in Hudson (id. at 77). SMED further contends that this type of loss is a consequential business loss and not a type of severance damage contemplated by Section 43 (id.). Second, SMED claims that this type of loss is the type of routine business risk for which the Department should not be granting indemnification (id.). Third, SMED asserts that this type of damage is uniquely subject to mitigation, but HL&PD has made no such mitigation attempt (id. at 78).

b. Economic Damages

SMED asserts that losses related to contracts resulting from a reduction in sales should be excluded from the damages calculation for two primary reasons (SMED Pre-Hearing Brief at 9). First, SMED argues, HL&PD is only authorized by its Enabling Act to "bind" Stow and SMED with respect to generating plant physically located inside Hudson (id. at 12). SMED maintains that the Enabling Act's provision that Hudson may construct a plant in Stow for the distribution of electricity "to be manufactured at its central station in

said Hudson" limits HL&PD to serving Stow with electricity which it generates within HL&PD's borders, and thereby prohibits HL&PD from entering into contracts to serve Stow (id., citing St. 1898, c. 143, § 1). SMED argues that because there is no statutory authority for HL&PD to bind SMED with respect to any such contracts or agreements, there is no statutory authority for the Department to recognize any such contracts or agreements in assessing damages to SMED (id. at 13).

Second, according to SMED, the current statutory scheme, including Section 43 and the Enabling Act, excludes consequential damages of the type sought by HL&PD from the calculation of compensation for tangible property taken by a municipality (id. at 14). SMED argues that Section 43's reference to damages caused by the severance of property is limited to those damages which result from the physical severance of plant in service in Stow from other utility plant in service in Hudson, such as the costs, if any, of relocation of poles, conductors, and transformers (id. at 16). In SMED's view, damages or future losses resulting from lost power sales from HL&PD to Stow are not severance damages resulting from the physical severance of tangible plant in Stow from tangible plant in Hudson (id.). SMED further argues that losses resulting from lost sales are a routine type of financial exposure faced by businesses and cannot be characterized as severance damages (id. at 16-17).

SMED posits that statutes are to be construed as written, not as they might have been written with certain words added (id. at 17, citing Edgartown v. Edgartown Water Company, 415 Mass. 32 (1993); Brennan v. Board of Election Commissioners of the City of Boston,

310 Mass. 784 (1942)). According to SMED, if the Legislature had intended to include consequential future losses as damages, it could have easily done so (id. at 17). SMED argues that Section 43's predecessor statute, St. 1891, c. 370, did not permit economic severance damages resulting from loss of sales to be included in the purchase price (id. at 20). According to SMED's interpretation of the statute, physical severance damages (i.e., relocation costs) should be specifically limited to "the damages suffered by the severance of any such plant lying outside the limits of such city or town" but only in cases where the "central lighting station ... lie[s] within the limits of the city or town which has voted to establish a plant" (id. at 21, citing St. 1891, c. 370, § 12). According to SMED, allowing the addition to the purchase price of damages for severance of plant when the central station was located in the acquiring town, and denying recovery otherwise, represents a Legislative recognition that a town deprived of its central plant likely would only be left with poles, wires and related distribution equipment which would require substantial reconfiguration and reconnection to be made useful, at considerable expense (id. at 21-22). SMED argues that the Legislature appears to have concluded that if the central station were not within the purchasing town's borders, the physical relocation costs would be minor and could be excluded from the purchase price entirely (id. at 22).

SMED further argues that, while the location of the central plant is not referenced in Section 43, the reference to the location in St. 1891 emphasizes that the Legislature had in mind only the direct costs of physical severance of tangible property when it used the term severance of plant (id. at 22). SMED maintains that if severance of plant in St. 1891, c. 370, § 12 included items other than physical relocation costs, there would have been no

rationale for conditioning their recovery upon the physical situs of the central plant (id. at 23).

SMED also asserts that the economic severance damages claimed by HL&PD are losses resulting from HL&PD's lost sales to Stow, which in turn result from contractual obligations of HL&PD to purchase certain amounts of wholesale power at certain prices, regardless of whether Stow is a customer (id. at 25). SMED maintains that HL&PD's claim for economic severance damages resulting from wholesale power contract obligations reduces to a complaint that HL&PD will be deprived of the opportunity to spread its costs of operations, including purchase power costs, over as large a customer base as it currently has (id. at 26). SMED argues that the language of Section 43 that prohibits the consideration of "future earning capacity, goodwill, or exclusive privileges derived from rights in the public ways" excludes this type of economic severance damages (id. at 25, citing, G.L. c. 164, § 43). According to SMED, these exclusions are synonymous with concepts such as sales revenues and contract liabilities (id. at 26-27).

SMED also asserts that the term "severance damages" is a term of art that developed in eminent domain proceedings in other jurisdictions after the enactment of St. 1891 and thus, because it could not have been known in 1891, cannot apply in this case (id. at 29). SMED notes that "severance damages" in eminent domain refers to that portion of the value calculation attributable to the depreciation or diminution in value of the remainder of land not taken (id. at 30, n.14). In contrast, SMED indicates that the term "severance" was a known term in 1891 (id. at 31); this term was defined as "the cutting of crops, such as corn, grass, etc., or the separating of anything from the realty" (id. at 31, citing Black, A Law

Dictionary, Second Ed. (1910)). SMED argues that "severance" in 1891 denoted a physical division (id. at 32). SMED therefore claims that the statutory language only contemplates physical severance damages (id. at 29). However, SMED argues in the alternative that, even if the eminent domain concept of severance damages applied in this matter, under eminent domain law, consequential damages to the business conducted on the portion of the property not taken by eminent domain are not an element of recovery available to the owner (id.).

SMED argues that the general rule for partial takings in eminent domain law provides that the landowner is entitled to the difference between the value of the entire tract immediately prior to the taking and the value of the property remaining following the taking so that he is compensated for the loss in fair market value of what is taken (id. at 33, citing United States v. Miller, 317 U.S. 369, 374 (1943)). SMED points out that this measure of damages is the present diminution of value of the realty, not prospective losses emanating from the business conducted thereon (id. at 34). SMED argues that the concept of "severance damage" does not alter this principle (id. at 36). According to SMED, there is an alternative "severance damage" approach whereby the owner's loss may also be measured as the sum of the fair market value of the portion of the land taken plus the diminution in value of the land retained (id. at 36). Thus, contends SMED, "severance damage" in eminent domain law is merely part of an alternative method of calculating the "diminution in value" in the owner's property (id. at 37). SMED asserts that eminent domain law does not take into account consequential losses on property not taken, resulting from business losses caused by the taking (id. at 37, citing United States v. 91.90 Acres of Land, 586 F.2d 79, 88 (9th Cir. 1978); Whitehead v. Florida Power & Light Company, 318 So. 2d 154, 157 (Fla.

App. Ct. 1975)). SMED further asserts that the fair market value of the remaining HL&PD property will be unaffected by Stow's establishment of its own municipal electric department except for the limited costs occasioned by the need to terminate and reconnect lines intersected by the Stow-Hudson common boundary lines (id. at 38-39).

SMED also argues that HL&PD should not be entitled to economic severance damages because HL&PD could have protected itself against a departure by Stow by negotiating suitable terms in HL&PD's wholesale power contracts or by asking Stow to contract to stay within the HL&PD system for a fixed term of years, which it did not do (id. at 44). SMED maintains that HL&PD could have contracted against liability and risk in two ways: first, in contracts between HL&PD and HL&PD's suppliers which modified HL&PD's obligation to purchase power contingent upon whether Stow remained a customer; and second, in contracts between HL&PD and Stow (id.). With regard to the first option, SMED states that it has no information on whether HL&PD attempted such negotiation, but assumes that HL&PD acted prudently to obtain wholesale power contracts that in fact contain some mechanism for the contingency of Stow's leaving the HL&PD's system (id.). With regard to the second option, SMED argues that HL&PD never involved Stow in the contract process (id. at 45). SMED notes that Reading, faced with a similar situation, contracted with Wilmington pursuant to a special statute, St. 1990, c. 405, for Wilmington to stay in the Reading system for twenty years (id. at 46). SMED argues that Reading would not have gone through the trouble of obtaining passage of St. 1990, c. 405 and in turn executing a twenty-year contract with Wilmington if severance damages pursuant to G.L. c. 164, § 43

included consequential damages related to contracts (id. at 46).[48] SMED argues that HL&PD, aware of the current statutory scheme, failed to take the prudent step of obtaining a contractual obligation from Stow to continue to purchase electricity from HL&PD, and now cannot force the statute to read as if HL&PD had taken such a step (id. at 47).

SMED also makes the same policy arguments against the inclusion of economic damages related to the contracts as it does for exclusion of the contracts from the property to be included in the sale (id. at 48-49). In summary, SMED claims that allowing recovery of damages would (1) be anticompetitive; (2) reward incompetence and punish competence; (3) allow recovery of imprudent investment; and (4) expose Stow ratepayers to an unreasonable financial burden. See Section II.D.2.b., above.

C. Analysis and Findings

Section 43 provides that the price of the property to be included in the purchase "shall include damages, if any, which the Department finds would be caused by the severance of the property proposed to be included in the purchase from the property of the owner." As the statute is constructed, it is only after the Department determines what property is in the public interest to include in the purchase that the Department determines the price of that property, such price to include damages. The statute provides the Department with discretion in determining what property should be included in the purchase by its reference to

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[48] SMED notes that Reading's special statute (St. 1908, c. 369), which enables the Reading Municipal Light Department to serve the towns of North Reading, Wilmington, and Lynnfield, is otherwise identical to HL&PD's special statute (St. 1898, c. 143) in that both special statutes incorporate by reference the consonant provisions of G.L. c. 164, §§ 42 and 43.

the public interest. No such explicit discretion is granted in connection with the damage determination, although the Department notes that it must always consider the public interest in making its determinations.

In Section II, above, the Department determined that it is in the public interest to include only physical property in the purchase. The Department found that it is not appropriate to include the contracts as property to be purchased by SMED. HL&PD has argued that as an alternative to requiring SMED to purchase such contracts as a slice of HL&PD's system, SMED should be required to pay for the costs of those contracts as damages. Since the Department has determined, as a matter of public interest, that SMED should not be required to purchase the contracts and agreements, the Department could not here require SMED to pay the same costs under the guise of damages. Therefore, we will only address HL&PD's claims for damages other than the contract claim.

It is a fundamental rule of damages that in order to be compensable, damages must be direct and certain, not remote and speculative. Alabama Power Company v. Alabama Public Service Commission, 24 P.U.R. 3d 309 (1958), citing Southern R. Company v. Coleman, 44 So. 837 (Ala. Sup. Ct. 1907); See also Squeri v. McCarrick, 32 Mass. App. Ct. 203 (1992). Thus, in order for the claimed physical damages to be compensable, the Department must find them to be direct and certain. The Department considers each of HL&PD's four physical damage claims within this context.

1. Physical Termination and Reconnection Costs

With respect to the claimed termination and reconnection damages, the Department notes that the establishment of a separate electric system under SMED, independent from

HL&PD, would affect a number of physical components of the existing HL&PD distribution system. Specifically, six distribution lines that cross the boundaries between Hudson and Stow would be subject to disconnection, or termination. HL&PD and SMED have recognized that termination of these six lines is necessary, and agreed on a figure of $15,953 for this. In addition, HL&PD contends that two of the six lines require reconnection, in the amount of $33,220. SMED disputes this claim, asserting that the initial estimate of $15,953 is sufficient for both termination and reconnection.

The Department accepts HL&PD's and Stow's estimate of $15,953 for the costs of termination. However, the Department notes that termination without reconnection would leave the HL&PD system in an impaired state. Without reconnection, HL&PD's system would be unable to supply two areas in Hudson. By selecting HL&PD's initial estimate of termination costs as the estimate for all costs, SMED has not fully recognized the extent of damages that would be imposed on HL&PD's system, particularly the impairment to HL&PD's system that would result as a consequence of termination. Based on the record in this proceeding, the Department finds that damages associated with termination and reconnection are direct and certain. The Department further finds that severance damages in the amount of $49,173, i.e., $15,953 for termination and $33,220 for reconnection, are warranted with respect to termination and reconnection.

2. Loss of HL&PD Plant Outside of Stow and Hudson

With respect to damages associated with the loss of HL&PD plant outside of Stow and Hudson, the Department notes several important elements of this claim. First, 42 HL&PD customers located in the Other Towns rely on this plant as their means of

receiving electrical supply. Second, the record is unclear as to how reliable electrical service to these customers would be ensured once Stow departs from Hudson. Finally, the Department believes this claim more closely approximates a claim for property as opposed to a claim for severance damages.

The Department notes that this distribution plant is fully integrated into the present HL&PD distribution system. HL&PD's present distribution system consists of distribution lines originating in Hudson, extending into Stow, and in these instances extending beyond Stow into the communities of Boxboro, Harvard, Bolton, and Maynard. In each case, the extension into the affected community is slight in terms of distance and is immediately adjacent to the border between the affected community and Stow.

The Department recognizes that once Stow departs from Hudson, HL&PD's continuation of service to the 42 customers is infeasible. For example, HL&PD's witness stated that it would be "impractical" for HL&PD to attempt to retain the customers in the affected communities (Tr. 1, at 135). In addition, HL&PD's witness stated that installing a new line to maintain service to Boxboro would cost over $500,000 and that it would be "unreasonable to build a line like that, to service it and maintain it for the small group of customers" (id. at 141-142). HL&PD's witness indicated that for safety and service reliability reasons, "you can't have an isolated amount of property owned by another utility in somebody's system" (id. at 87). The witness also stated, without elaboration, that providing service by wheeling at the distribution level is "not a practice that's currently being done, and I think there's good reasons why it shouldn't be done" (id. at 139-140).

Nevertheless, HL&PD's stated purpose in claiming severance damages for this distribution plant is to allow it to make arrangements to ensure that the customers served by this distribution plant continue to receive reliable electric service (Exh. H-1, at 19-20).[49] Details on the arrangements and how these would be implemented were not provided.

The Department notes its serious concern regarding the vagueness of HL&PD's plans to ensure future service for the 42 customers located in the Other Towns. In terms of service arrangements that would follow SMED's departure from HL&PD, customers in Stow would receive service from SMED and customers in Hudson would continue to receive service from HL&PD, but service arrangements for the 42 customers in the Other Towns

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[49] SMED contended that HL&PD could have mitigated its claim for damages in three ways: (1) sell this distribution plant to utilities "with authority to serve these towns;" (2) contract with SMED or other utilities to wheel power; or (3) contract with third parties to serve these customers in place of HL&PD (SMED Initial Post-Hearing Brief at 76). Yet, in each case, the record provides little support for these contentions. First, in terms of sale of this distribution plant, no information was provided to demonstrate whether mitigation by sale would be economic or feasible. For example, sale of this distribution plant would likely require intercomections with the purchasing utilities, adding costs and thereby decreasing the attractiveness of a sale. Further, a sale would likely require termination with the existing HL&PD system, also adding costs. Given the relatively small sizes of these loads, it is questionable whether the investments necessary to accommodate a sale would be made.
With respect to mitigation by wheeling, it is clear that once SMED terminates from HL&PD, any wheeling between these two systems would be impossible. No physical interconnection would exist to permit such wheeling. Wheeling arrangements with neighboring utilities would depend on factors such as wheeling charges, capacity available to accommodate wheeling, and the existence of physical interconnections between the wheeling system and the distribution plant in question. Finally, no evidence was provided to demonstrate the economics or feasibility of service by HL&PD by means of a contract. In addition, the Department notes that mitigation in the form of construction of discrete distribution lines from the main HL&PD system to these areas is unlikely to be either economic or environmentally sound, largely because of the distances involved, the relatively small loads, and the approvals needed from numerous affected communities.

have not been identified. The Department believes this to be a serious oversight that is contrary to the Department's statutory mandates to ensure that customers in the Commonwealth receive sufficient, reliable service at reasonable cost. G.L. c. 164, §§ 60, 92. The Department is committed to providing all customers in the Commonwealth with reliable electrical service on a continuous basis without disruption.

HL&PD estimated the value of the distribution plant located in the Other Towns based on the property components of this distribution plant, as opposed to the costs of arranging a new form of service. In performing this estimate, HL&PD first itemized the components by type, quantity, and location, and then assigned dollar values to these (Exh. SMED-13). The methodology used in valuing this distribution plant was identical to that used for valuing similar distribution plant located in Stow (Exh. HL&PD-2). Following Stow's departure, the distribution plant in the Other Towns would continue to be interconnected with the distribution system inside Stow, i.e., the SMED system.

Based on the foregoing, the Department finds that distribution plant outside of Stow and Hudson in the Other Towns is property to be assigned to SMED, with the obligation that SMED provide reliable service to the 42 customers in the Other Towns.[50] The Department finds further, consistent with our findings on valuation in Section III.D., above, that the appropriate valuation methodology for this property is 50 percent OCLD, and 50 percent

[50] The Department notes its statutory authority to ensure service to customers as set forth in G. L. c. 164, §§ 47, 60. See also Wellesley Department of Public Works, D.P.U. 86-45/86-144 (1987).

RCNLD with the depreciation category of life extension deleted.[51] This results in a total of $79,369 for the distribution plant in the Other Towns, composed of 50 percent OCLD in the amount of $29,779 and 50 percent RCNLD absent life extension in the amount of $49,590.[52]

3. Reduced Utilization of Power Delivery Properties

Reduced utilization of power delivery properties involves two different types of components of the HL&PD system. First, HL&PD contends that there will be reduced utilization of a distribution substations, and Substation No. 1, and Substation No. 2 ("Substations"), and of two distribution circuits, i.e., Supply Circuit 14-6 and Supply Circuit 14-7 ("Supply Circuits").

HL&PD has assigned a share of the costs of the Substations to SMED. Yet, following SMED's departure, the Substations will suffer no physical impairment. The Department also notes that no particular element of the Substations is dedicated to Stow alone, to the extent that Substation capabilities would be affected by SMED's departure.[53] The Substations are interconnected to one another, contain transformers of identical rating,

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[51] The Department notes that, since HL&PD will not be required to arrange service for the 42 customers in the Other Towns, its claim for severance damages on this point is moot.

[52] The Department notes that the loss of revenue contributions to HL&PD from the 42 customers in Boxboro, Harvard, Bolton, and Maynard will be offset by load growth taking place within Hudson, as stated in Section II, above.

[53] HL&PD's witness stated that the Substations serve "all of Hudson's load" as opposed to a specific load (Tr. 1, at 156).

and are capable of operating in a coordinated manner.[54] Moreover, HL&PD has indicated that its Substations were installed for purposes of system-wide reliability,[55] and no indication was made that system-wide reliability would be degraded following the departure of SMED. Thus, it has not been demonstrated that the loss of Stow's load will affect the physical capabilities of the Substations. Based on the foregoing, the Department finds that severance damages related to reduced utilization of HL&PD's Substations have not been shown to be direct and certain. Accordingly, the Department finds that no severance damages are warranted for reduced utilization of HL&PD's Substations.

Regarding the reduced utilization of its Supply Circuits following Stow's departure, HL&PD asserts that these facilities were installed to serve Stow, that these properties have no meaningful value to HL&PD except to serve Stow, and that costs will go unrecovered unless compensation is awarded in the form of severance damages.

Service to Stow has been provided by HL&PD through the Supply Circuits. For example, HL&PD has estimated that Stow utilizes 80 percent of circuit 14-6 and 70 percent of Circuit 14-7.[56] It is apparent that once the Supply Circuits are terminated, i.e., disconnected at the Hudson/Stow border, utilization levels will fall since Stow loads will no

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[54] The transformers are 115 kV to 13.8 kV, rated at 24/32/44 MVA (Exh. HL&PD-24).

[55] HL&PD's witness stated that Substation No. 1 was built to "supply the total needs for Hudson's system" (Tr. 1, at 160-161). In addition, HL&PD noted that in 1992 it added a third transformer to its distribution system for purposes of system reliability (Exh. DPU-44).

[56] HL&PD's witness stated that these utilization estimates were derived for each circuit by tabulating the percentage of transformer connections in Hudson as measured in kilovoltamperes ("kva"), and then subtracting that percentage from 100 percent to determine Stow's percentage (Tr. 2, at 66-67).

longer flow on these lines.[57] However, following termination, these lines remain capable of carrying loads and operating as an integral part of Hudson's system. In other words, the Supply Circuits would not be physically impaired because of Stow's departure, even though their level of use would decrease.[58] Since the Supply Circuits would remain capable of serving the existing Hudson customers on their path, and would remain capable of carrying loads up to the levels carried previously, no physical damages would result to these Supply Circuits because of the departure of Stow. Based on the foregoing, the Department finds that severance damages related to reduced utilization of the Supply Circuits have not been shown to be direct and certain. Accordingly, the Department finds that no severance damages are warranted for reduced utilization of HL&PD's Supply Circuits.

4. Lost Utilization of Service Equipment

With respect to damages associated with lost utilization of service equipment, HL&PD's claim focuses on an office building, garage, and office equipment involved with HL&PD's provision of services, including service to Stow. While HL&PD claims reduced utilization of these facilities if Stow leaves its system, the record does not support this claim. HL&PD's analysis of this issue consisted of a projection of cost information that assumed that a level of reduced utilization would occur. However, details underlying that assumption

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[57] The Department notes that although reduced utilization of the Supply Circuits could be mitigated by load growth along the path of the Supply Circuits, no evidence has been presented to demonstrate that new loads are locating in those areas.

[58] The Department notes that utilization of the Supply Circuits would be reduced, but not eliminated. For example, HL&PD has projected its use as 20 percent of Circuit 14-6 and 30 percent of Circuit 14-7 (Exh. HL&PD-2, exh. RTG-6; Tr. 2, at 66-67).

were not provided. No detailed information was provided by HL&PD to indicate what office building, garage, or office equipment items would be underutilized, to what extent, and with what costs, as a consequence of Stow's departure. For example, it is unclear whether HL&PD would greatly alter its staff activities under a Stow departure, to include staff layoffs, downsizing, or reduced hours. In the absence of direct information that would explain and support the claim of reduced utilization of service equipment, the Department can only speculate as to the effects of a Stow departure on service equipment utilization.

Furthermore, it has not been demonstrated that HL&PD's office space, garage, or office equipment utilization correlate to Stow's load. While HL&PD has proposed allocating 12.6 percent of the cost of office space, garage and office equipment to Stow – reflective of Stow's percentage of peak load – it is not apparent that usage of these items is determined by load. Office space, garage, and office equipment usage might depend on factors such as HL&PD's management priorities, the characteristics of specific customers, including customers located in Hudson, and the types of equipment and technologies in use, as opposed to a load percentage that is based solely on municipal boundaries. In the absence of evidence that would explain and support the claim of reduced utilization, the Department finds that severance damages related to reduced utilization of service equipment have not been shown to be direct and certain. Accordingly, based on the foregoing, the Department finds that no severance damages are warranted for reduced utilization of service equipment.

V. SUMMARY

The Department has found that the property that ought to be included in a sale between HL&PD and SMED is HL&PD's physical property located in Stow and in the Other Towns. Appendix A attached to this Order lists the property to be purchased. The Department also has found that the total price to be paid for this property is $2,554,472,

which includes $2,425,930 for the physical property located in Stow, $79,369 for the physical property located in the Other Towns, and $49,173 for the physical severance damages as a result of the termination and reconnection of HL&PD's system. Appendix B attached to this Order shows the calculation of the purchase price.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, the Department hereby

DETERMINES: That it is in the public interest to include the physical property presently owned by Hudson Light & Power Department, which is located within the Town of Stow, in a sale between Hudson Light & Power Department and Stow Municipal Electric Department pursuant to G.L. c. 164, § 43; and

FURTHER DETERMINES: That the price to be paid for the Hudson Light & Power Department's property located in the Town of Stow should be $2,425,930; and

FURTHER DETERMINES: That Stow Municipal Electric Department should compensate Hudson Municipal Light & Power Department for the property located in the Towns of Bolton, Boxboro, Maynard and Harvard in the amount of $79,369; and

FURTHER DETERMINES: That Stow Municipal Electric Department should assume the obligation to provide reliable service to the 42 customers in the Towns of Bolton, Boxboro, Maynard, and Harvard presently being served by Hudson Light & Power Department; and

FURTHER DETERMINES: That Stow Municipal Electric Department should compensate Hudson Light & Power Department for severance damages for termination and reconnection costs in the amount of $49,173; and

FURTHER DETERMINES: That this Order shall be applicable to a transaction completed within 180 days of this Order, in compliance with G.L. c. 164, § 43.

By Order of the Department,

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John B. Howe, Chairman

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Mary Clark Webster, Commission

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Janet Gail Besser, Commissioner